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The Right of Religious Landlords to Exclude Unmarried Cohabitants: Debunking the Myth of the Tenant's "New Clothes"

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I. INTRODUCTION

So the emperor went along in the procession, under the splendid canopy, and everyone in the streets said: "How beautiful the emperor's new clothes are! What a splendid train! And how well they fit!" No one wanted to let it appear that he could see nothing, for that would prove him not fit for his post. None of the emperor's clothes had been so great a success before. "But he has nothing on!" said a little child. "Just listen to the innocent," said the child's father. And one person whispered to another what the child had said. "He has nothing on. A child says he has nothing on!" "But he has nothing on," cried all the people. The emperor was startled by this, for he had a suspicion that they were right. But he thought, "I must face this out to the end and go on with the

> procession." So he held himself more stiffly than ever, and the chamberlains held up the train that was not there at all.[1]

In Hans Christian Andersen's classic fable, the emperor expended all of his resources on new clothes, forsaking his governmental responsibilities and the more noble pursuits of life. His obsession with new attire made him susceptible to the tricks of two master weavers who professed to make the most exquisite clothes imaginable. These charlatans claimed their work was invisible only to fools. They tricked the emperor into spending an extravagant sum of money on their wonderful "clothes." The emperor's subjects raved about his new clothes, which he displayed in a grand procession. Finally, one child, not afraid to be considered foolish, exclaimed the truth that the emperor was naked.[2]

This fable is being played out in American landlord and tenant law. The Supreme Court of Alaska, a plurality of the Supreme Court of California, and the Supreme Court of Michigan have recently assumed the posture of the emperor.[3] Forsaking higher principles like protecting property rights, religious liberty and the sanctity of marriage, these rulers have myopically pursued the goal of forcing unmarried tenants on landlords who register a sincere religious objection to the tenants' conduct. The three courts based their decisions primarily on the premise that the state must stamp out all invidious discrimination, including, in this instance, "marital status" discrimination.[4] According to the Alaska Supreme Court, the state has a governmental interest in preventing discrimination "based on irrelevant characteristics" that "degrades individuals, affronts human dignity, and limits one's opportunities."[5] What rational person could possibly oppose such a noble goal and support invidious discrimination? Like the emperor's procession, these rulers have proudly brought out their "new

1. Hans Christian Andersen, *The Emperor's New Clothes, in* THE BOOK OF VIRTUES 630, 633-34 (William J. Bennett ed., Simon & Schuster 1993)(1837).
2. *See id.*
3. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996)(plurality opinion); McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998).
4. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278-84 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 914-31 (Cal. 1996)(plurality opinion); McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998).
5. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994); *see also* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996)(plurality opinion)(state must protect equal access to public accommodations and tenants' dignity interest in freedom from discrimination based on personal characteristics); McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998)(state's need to provide equal access to housing outweighs landlord's religious beliefs). This view was first articulated by a member of the Supreme Court of Minnesota. *See* State v. French, 460 N.W.2d 2, 16 (Minn. 1990)(Popovich, C.J., dissenting)(referring to the state's compelling interest in eliminating "invidious" and "pernicious" discrimination against unmarried couples in housing).

clothes" for all to see. Unlike the emperor, however, they have been pleased to share the clothes with any subject who wants them. Not surprisingly, many of the ruler's subjects have, with varying degrees of enthusiasm, advocated or applauded this minority trend in the law.[6]

As *The Emperor's New Clothes* teaches, the mere fact that numerous people affirm a naked assertion does not make it true. It is often difficult to disprove an idea that has gained a measure of acceptance, particularly when those who have a political or personal interest in the proposition espouse intricate theories in its support. So it is with the notion that a landlord's refusal to rent to unmarried cohabitants

6. *See* Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487 (1998); Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699 (1995)[hereinafter Markey, *The Price*]; Keirsten G. Anderson, Note, *Protecting Unmarried Cohabitants from the Religious Freedom Restoration Act*, 31 VAL. U. L. REV. 1017 (1997); John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991); Melissa Fishman Cordish, Comment, *A Proposal for the Reconciliation of Free Exercise Rights and Anti-Discrimination Law*, 43 UCLA L. REV. 2113 (1996); Kelly D. Eckel, Comment, *Legitimate Limitation of a Landlord's Rights—A New Dawn for Unmarried Cohabitants*, 68 TEMP. L. REV. 811 (1995); Malgorzata (Margo) K. Laskowska, Comment, *"No Sinners Under My Roof": Can California Landlords Refuse to Rent to Unmarried Couples by Claiming a Religious Freedom of Exercise Exemption from a Statute Which Prohibits Marital Status Discrimination?*, 36 SANTA CLARA L. REV. 219 (1995); Robert C. Mueller, Case Comment, Donahue v. Fair Employment and Housing Commission: *A Free Exercise Defense to Marital Status Discrimination?*, 74 B.U. L. REV. 145 (1994); Rita M. Neuman, Note, *Closing the Door on Cohabitants Under Wisconsin's Open Housing Law*, 1995 WIS. L. REV. 965 (1995); Matthew J. Smith, Comment, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055 (1992); Rebecca A. Wistner, Note, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws*, 46 CASE W. RES. L. REV. 1071 (1996). A few commentators while not providing the same analysis as this Article does, however, have declined to endorse this trend. Most prominently, a Yale Law Professor has referred to the cases in which the court has held that a religious landlord committed marital status discrimination by refusing to rent to unmarried cohabitants as "terribly wrong and dangerous." Stephen L. Carter, *The Free Exercise Thereof*, 38 WM. & MARY L. REV. 1627, 1650 (1997). The other dissenters include: James C. Geoly & Kevin R. Gustafson, *Religious Liberty and Fair Housing: Must A Landlord Rent Against His Conscience?*, 29 J. MARSHALL L. REV. 455 (1996); Scott A. Johnson, Note, *The Conflict Between Religious Exercise and Efforts to Eradicate Housing Discrimination Against Nontraditional Couples: Should Free Exercise Protect Landlord Bias?*, 53 WASH. & LEE L. REV. 351 (1996); George L. Opie, Note, *The Free Exercise of Religion—State Court Devalues Landlords' Constitutional Rights*: Attorney Gen. v. Desilets, 20 S. ILL. U. L.J. 181 (1995); Peter M. Stein, Note, Smith v. Fair Employment and Housing Commission: *Does the Right to Exclude, Combined With Religious Freedom, Present a "Hybrid Situation" Under* Employment Division v. Smith?, 4 GEO. MASON L. REV. 141 (1995)(discussed at *infra* notes 244-57 and accompanying text).

constitutes marital status discrimination that cannot be excused even when the landlord acts on a sincere religious belief. The proponents of this new "right" for tenants have offered elaborate justifications for it, and recent decisions of the highest courts in Alaska, California, and Michigan show that these advocates have achieved a measure of success,[7] although most courts that have addressed this issue do not share their view.[8]

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7. This success was significantly undermined recently by the Ninth Circuit's decision in *Thomas v. Anchorage Equal Rights Comm'n*, Nos. 97-35220 & 97-35221, 1999 WL 11337 (9th Cir. Jan. 14, 1999), an opinion that was released well after this article was accepted for publication but shortly before it was published. In *Thomas*, the court held that an Alaskan landlord who objected on religious grounds to renting to unmarried couples was entitled, under the Federal Free Exercise Clause, to an exemption from the Alaska fair housing law and a local fair housing ordinance. *See id.* at *26. *Thomas* is discussed at several points in sections IV.B and Part V *supra*. If *Thomas* remains the law in the Ninth Circuit, religious landlords in Alaska, California and the other states within the Ninth Circuit should be entitled to such exemptions as a matter of federal constitutional law, notwithstanding the holdings in *Swanner* and *Smith v. Fair Employment & Housing Commission*.

   Massachusetts is the only jurisdiction other than Alaska, California and Michigan in which it is established that a landlord who refuses to rent to unmarried cohabitants commits marital status discrimination. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994). However, in *Desilets,* the court remanded and directed the state to grant the landlord a religious exemption unless it could prove the exemption would lead to a housing shortage for cohabitants. *See id.* at 235; *see also* Worcester Hous. Auth. v. Massachusetts Comm'n Against Discrimination, 547 N.E.2d 43, 44-45 (Mass. 1989) (holding state statute prohibiting public housing agents from withholding public accommodations because of marital status was violated when couples were denied public housing benefits solely because they were unmarried). Only the Supreme Court of Alaska, a plurality of the Supreme Court of California, and the Supreme Court of Michigan have absolutely refused to grant the landlord a religious exemption in this type of case. A panel of the Illinois Appellate Court recently adopted a similar position, but the Illinois Supreme Court, without issuing an opinion, promptly vacated the decision. *See* Jasniowski v. Rushing, 678 N.E.2d 743 (Ill. App. Ct. 1997), *vacated*, 685 N.E.2d 622 (Ill. 1997).

8. *See generally* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337 (9th Cir. Jan 14, 1999)(enforcement of city's antidiscrimination laws against landlords who objected on religious grounds to renting to unmarried couples violated the Free Exercise, Free Speech and Takings Clauses of the U.S. constitution); Jasniowski v. Rushing, 685 N.E.2d 622 (Ill. 1997)(vacating appellate court decision that held landlord was not entitled to a religious exemption because universal enforcement of the prohibition against marital status discrimination was the least restrictive means to eliminate such discrimination); Mister v. A.R.K. Partnership, 553 N.E.2d 1152 (Ill. App. Ct. 1990)(landlord's refusal to rent to unmarried cohabitants was not marital status discrimination); Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192 (Md. 1984)(cooperative housing development's policy against cohabitation by unmarried couples was not marital status discrimination); Prince George's County v. Greenbelt Homes, Inc., 431 A.2d 745 (Md. Ct. Spec. App. 1981)(city ordinance prohibiting discrimination on basis of marital status did not preclude enforcement of contract limiting occupancy to legally married couples);

This Article explains why the "right" of unmarried cohabitants[9] to force themselves and their sexual ethics on objecting religious landlords is as illusory as the emperor's new clothes.[10] Part II demonstrates why, under well-established principles of statutory construction, the landlord's decision not to rent to an unmarried couple cannot constitute marital status discrimination unless the legislature has explicitly protected such couples. Because no statute currently provides this protection, landlords cannot presently commit marital status discrimination by refusing to rent to unmarried couples. Part III demonstrates that, even assuming these landlords do commit marital status discrimination, a statute which protects unmarried couples is an invalid exercise of the state's police power if there is no evidence that religiously-objecting landlords pose a sufficient threat to the ability of unmarried couples to obtain suitable housing. Part IV describes the numerous theories that landlords may use to obtain strict scrutiny review of any law which proscribes discrimination against unmarried couples. Part V analyzes the relative interests of the landlord and the state under strict scrutiny review and demonstrates that there are several reasons why a landlord who has a sincere religious objection to the law should be entitled to an exemption. Part VI provides some final observations.

State v. French, 460 N.W.2d 2 (Minn. 1990)(landlord's refusal to rent to unmarried cohabitants was not marital status discrimination); McFadden v. Elma Country Club, 613 P.2d 146 (Wash. Ct. App. 1980)(refusal to allow unmarried couple to join a country club that included the privilege of property ownership in the community was not marital status discrimination); County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993)(landlord's refusal to rent to unmarried cohabitants was not marital status discrimination). *Cf.* Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Ct. App. 1991), *review granted*, 825 P.2d 766 (Cal. 1992), *review dismissed,* 859 P.2d 671 (Cal. 1993)(not published in official reporter and cannot be cited in California)(although landlord's refusal to rent to unmarried couple was marital status discrimination, landlord was entitled to a religious exemption); Attorney Gen. v. Disilets, 636 N.E.2d 233 (Mass. 1994)(landlord's refusal to rent to unmarried couple was marital status discrimination, but on remand the state must establish that it has a compelling interest that can only be satisfied by denying the landlord a religious exemption); Hudson View Properties v. Weiss, 450 N.E.2d 234 (N.Y. 1983)(landlord could enforce a provision restricting occupancy to tenant and immediate family notwithstanding prohibition against marital status discrimination).

9. This Article only analyzes disputes involving unmarried heterosexual couples. While many of the principles discussed in this Article will apply equally to cases involving homosexual couples, such cases may also implicate gender and sexual orientation issues that are beyond the scope of this Article.

10. Although this characterization may initially seem slanted in favor of the landlord's position, this Article will demonstrate that it accurately portrays the nature of this landlord and tenant dispute. In any event, this characterization is certainly no less objective than posing the issue as simply whether the state must eradicate invidious discrimination.

II. STATUTORY ANALYSIS

A. Current State Laws Regarding Marital Status Discrimination and Unmarried Cohabitants

Because there is no federal legislation prohibiting marital status discrimination, state and local law will govern disputes between landlords and unmarried couples.[11] There are currently no state laws that explicitly protect unmarried cohabitants from discrimination in housing. However, some state statutes generally proscribe "marital status" discrimination. The state laws governing landlord discretion in selecting tenants fall within three general categories: (1) those which do not prohibit marital status discrimination; (2) those which prohibit marital status discrimination but explicitly allow landlords to exclude unmarried cohabitants; and (3) those which prohibit marital status discrimination but do not explicitly protect unmarried cohabitants. As will be explained below, the first two approaches clearly offer unmarried cohabitants no protection from landlords who do not wish to rent to them. Although the third approach offers general protection from marital status discrimination, landlords do not violate these laws by refusing to rent to unmarried couples.

1. States Which Do Not Proscribe Marital Status Discrimination

Arkansas, Mississippi and Wyoming do not currently have a fair housing law. In twenty-five other states, the state fair housing law does not prohibit landlords from engaging in marital status discrimination.[12] There are two reasons why the common law will control in these jurisdictions. First, the court must not presume that a statute is designed to abrogate the common law fully unless the legislature

11. The Civil Rights Act of 1866 forbids racial discrimination in residential and commercial leasing. *See* 42 U.S.C. § 1982 (1994). The Fair Housing Act of 1968 forbids, subject to certain exemptions, discrimination in renting based on "race, color, religion, sex, familial status, or national origin." 42 U.S.C. §§ 3604(b), 3607 (1994).

12. *See* ALA. CODE § 24-8-4 (1992); ARIZ. REV. STAT. ANN. § 41-1491.14 (West 1992); FLA. STAT. ANN. § 760.23 (West 1997); GA. CODE ANN. § 8-3-202 (Harrison 1994); IDAHO CODE § 67-5909 (1989); IND. CODE ANN. §§ 22-9.5-5-1 to -3 (Michie 1997); IOWA CODE ANN. §§ 216.8 to .8A (West 1994 & Supp. 1998); KAN. STAT. ANN. § 44-1016 (1993); KY. REV. STAT. ANN. § 344.360 (Banks-Baldwin 1997); LA. REV. STAT. ANN. § 51:2606 (West Supp. 1998); ME. REV. STAT. ANN. tit. 5, § 4582 (West Supp. 1997); MO. ANN. STAT. § 213.040 (West 1996); NEV. REV. STAT. § 118.100 (1997); N.M. STAT. ANN. § 28-1-2 (Michie 1996); N.C. GEN. STAT. § 41A-4 (1990); OHIO REV. CODE ANN. § 4112.02(H) (Anderson Supp. 1998); OKLA. STAT. ANN. tit. 25, § 1452 (West Supp. 1998); PA. STAT. ANN. tit. 43, § 955(h) (West Supp. 1998); S.C. CODE ANN. § 31-21-40 (Law Co-op. 1991); S.D. CODIFIED LAWS § 20-13-20 (Michie 1995); TENN. CODE ANN. § 4-21-601 (Supp. 1997); TEX. PROP. CODE ANN. § 301.021 (West 1995); UTAH CODE ANN. § 57-21-5 (1994); VA. CODE ANN. § 36-96.3 (Michie 1996); W. VA. CODE § 5-11-9(6) (1994).

clearly expressed its intent to do so.[13] Second, under the statutory construction maxim *expressio unius est exclusio alterius*, when a statute lists specific items, it is presumed that the legislature intended to exclude all items not included.[14] In jurisdictions that have fair housing laws, discrimination is commonly prohibited based on such characteristics as race, national origin, religion, sex, and familial status. In these states, it will therefore be presumed that the legislature intentionally excluded other categories, such as marital status, from the statute. Thus, in states that do not have a fair housing law or that have a fair housing law that does not prohibit marital status discrimination, the common law will control.[15]

The common law gives landlords complete discretion in selecting tenants.[16] Unlike inns, leased premises are not considered to provide public accommodations.[17] An innkeeper has a duty to serve the public without engaging in unreasonable discrimination.[18] By contrast, a lease involves a property transaction culminating in a conveyance of an estate in land.[19] Like other property transactions, the landlord may choose freely with whom to do business.[20]

Therefore, in these twenty-eight states, landlords have the absolute right to exclude unmarried cohabitants.

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13. *See* 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 50.01, at 90 (5th ed. 1992).
14. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §47.23, at 216-17 (5th ed. 1992).
15. The sole exception is Louisiana, which is not a common law state. However, the Louisiana statute does not prohibit marital status discrimination or discrimination against unmarried cohabitants. *See* LA. REV. STAT. ANN. § 51:2606.A(1) (West Supp. 1998). Therefore, Louisiana law does not prohibit landlords from engaging in marital status discrimination.
16. *See* JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 241 (3d ed. 1989).
17. *See id.*
18. *See id.*
19. *See id.* at 235. The result of a lease is the landlord conveys a non-freehold estate to the tenant and retains a reversion in fee simple absolute (assuming, of course, the landlord had a fee simple to begin with). *See* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 6.1, at 249-50 (2d ed. 1993). The non-freehold estate entitles the tenant to the exclusive right of possession for the term of the lease. *See* CRIBBET & JOHNSON, *supra* note 16, at 235. Modern reforms have increasingly emphasized contract principles to govern landlord and tenant law. *See id.* at 235-36. Yet, the essential characteristics of a property transaction remain. *See id.* (describing modern reforms of landlord and tenant law and the continuing tension between property and contract principles). It is still true that the tenant receives a non-freehold possessory estate from the transaction. *See* CUNNINGHAM ET AL., *supra,* at 249-50. This estate is still characterized as at common law (e.g., a tenancy for years, periodic tenancy, or tenancy at will). *See* CRIBBET & JOHNSON, *supra* note 16, at 53-57.
20. *See* CRIBBET & JOHNSON, *supra* note 16, at 241.

2. Statutes Which Prohibit Marital Status Discrimination but Explicitly Exclude Unmarried Cohabitants from That Protection

Statutes in Connecticut and Oregon prohibit marital status discrimination generally but explicitly do not protect unmarried couples.[21] In Connecticut, the prohibition against marital status discrimination "shall not be construed to prohibit the denial of a dwelling to a man or a woman who are both unrelated by blood and not married to each other."[22] In Oregon, the prohibition against marital status discrimination does not apply to cases that "would necessarily result in common use of bath or bedroom facilities by unrelated persons of opposite sex."[23] The Oregon Attorney General has interpreted this provision to allow a landlord to refuse to rent to an unmarried couple.[24] Thus, in these two states, landlords may exclude unmarried cohabitants without committing marital status discrimination.

3. Statutes Which Generally Proscribe Marital Status Discrimination But Do Not Specifically Protect Unmarried Cohabitants

In the remaining twenty states and the District of Columbia, statutes proscribe marital status discrimination but do not explicitly protect unmarried cohabitants. These statutes are of two types: those that define "marital status," and those that do not.

a. Statutes Which Do Not Define "Marital Status"

Seventeen states have statutes that proscribe marital status discrimination in housing transactions but do not define "marital status."[25] None of these statutes explicitly protects unmarried couples.[26]

21. *See* CONN. GEN. STAT. ANN. § 46a-64c(b)(2) (West 1995); OR. REV. STAT. § 659.033(6) (1997). *See generally* Smith, *supra* note 6, at 1075.
22. CONN. GEN. STAT. ANN. § 46a-64c(b)(2) (West 1995).
23. OR. REV. STAT. § 659.033(6) (1997).
24. *See* 38 Op. Or. Att'y Gen. 181 (1976).
25. *See* ALASKA STAT. § 18.80.240 (Michie 1996); CAL. GOV'T CODE § 12955 (West Supp. 1998); COLO. REV. STAT. § 24-34-502 (1996); DEL. CODE ANN. tit. 6, § 4603 (1993); HAW. REV. STAT. § 515-3 (1993); MASS. GEN. LAWS ANN. ch. 151B, § 4.6 (West Supp. 1998); MICH. COMP. LAWS ANN. § 37.2502.502 (West Supp. 1998); MONT. CODE ANN. § 49-2-305 (1998); N.H. REV. STAT. ANN. § 354-A:10 (Supp. 1997); N.J. STAT. ANN. § 10:5-12(g)-(h) (West Supp. 1998); N.Y. EXEC. LAW § 296(5)(a)(1) (McKinney 1998); N.D. CENT. CODE ANN. § 14-02.4-12 (Supp. 1997)("status with respect to marriage"); R.I. GEN. LAWS § 34-37-4 (Supp. 1997); VT. STAT. ANN. tit. 9, § 4503 (1993); WASH. REV. CODE ANN. § 49.60.222(1) (West Supp. 1998); WIS. STAT. ANN. § 106.04 [1], [1 m(h)], [2] (West 1997). The Nebraska legislature has authorized localities to prevent marital status discrimination in public accommodation and housing. *See* NEB. REV. STAT. § 18-1724 (1997).
26. There also may be local ordinances that regulate a landlord's discretion in selecting tenants. *See* CRIBBET & JOHNSON, *supra* note 16. Although describing all rele-

Therefore, courts in these jurisdictions must apply principles of statutory construction to determine whether the legislature intended to provide such protection.

A court must construe undefined words and phrases in light of their ordinary meaning and the common law principles that govern them.[27] This principle of statutory construction controls because the legislature is presumed to know the ordinary and accepted meaning of words and to intend that meaning when such words or phrases are used without definition. *Black's Law Dictionary* defines "marital" as "[r]elating to, or connected with, the status of marriage . . . ."[28] Although "status" is therefore redundant, it is defined as "[t]he legal character or condition of a person or thing."[29] Because "marital status" accordingly means the legal character or condition of a person relating to marriage, the law of marriage will determine whether cohabitants enjoy a unique marital status.

The common law defined marriage as a permanent, monogamous relationship between a man and a woman.[30] This definition naturally begs the question of how a man and woman may achieve the status of marriage. In England, ecclesiastical courts originally adjudicated marital issues.[31] Because the United States has not had a national church or ecclesiastical courts, marriage has been regulated under American equity jurisdiction.[32] Facing the expanse of the American frontier and the frequent unavailability of a clergyman or civil officer to perform a marriage ceremony, the American colonies and early states generally accepted informal marriage.[33] This informal mar-

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vant local ordinances would be a daunting task and is beyond the scope of this Article, two observations about such ordinances are warranted. First, the analysis in this section will apply equally to any ordinance that forbids marital status discrimination. Second, when considering local ordinances, the court must address the additional issue of whether, under established principles of municipal law, the locality is authorized to adopt the ordinance and whether the ordinance is consistent with state law and public policy. *See, e.g.*, County of Dane v. Norman, 497 N.W.2d 714, 716 (Wis. 1993) (invalidating an ordinance that explicitly forbade discrimination against "cohabitants").

27. *See* SINGER, *supra* note 13, § 50.03, at 103-04. A court may also consult the applicable legislative history to see if it provides insight into how the legislature intended the courts to interpret such phrases. *See id.* § 47.28, at 248-49. It is beyond the scope of this Article to parse through the intricate details of the legislative history of all state fair housing laws. The following discussion assumes that the legislative history does not clearly establish how a court is to define "marital status."

28. BLACK'S LAW DICTIONARY 967 (6th ed. 1990).

29. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1134 (1984).

30. *See* HOMER H. CLARK, JR., 1 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.1, at 72 (2d practitioner's ed. 1987).

31. *See id.* at 69-71.

32. *See id.* at 72, 75.

33. *See id.* at 70-71.

riage, eventually known as "common law marriage," was based on two types of informal marriage recognized by the English ecclesiastical courts,[34] both of which involved a binding agreement between a man and woman to become husband and wife.[35]

Contrary to common misunderstanding, mere cohabitation, however long-standing, between a man and woman has never alone established a common law marriage. Rather, the mutual agreement of the man and woman to assume a marital relationship forms the foundation for a common law marriage.[36] The couple must also hold themselves out as married.[37] The additional requirement of cohabitation provides an objective basis for proving the mutual agreement to marry.[38] Although evidence of cohabitation may create an inference of an agreement to marry, such evidence alone cannot prove the existence of a common law marriage.[39] Thus, the common modern practice of living together either in lieu of marriage or as a test to see if marriage is desirable cannot, without more, establish a legally recognized common law marriage.

Eventually, the states began to adopt licensing and solemnization requirements and other forms of marriage regulation.[40] As these requirements were adopted, common law marriage came into increasing disfavor. Today, only thirteen states and the District of Columbia recognize common law marriages.[41]

The history of marriage law therefore shows that unmarried cohabitants do not, by virtue of cohabitation alone, have a unique marital status. They simply constitute an unmarried couple, composed of two single people. "While each [cohabitant] separately ha[s] a marital status, collectively they d[o] not. Only marriage as prescribed by law can change the marital status of an individual to a new legal entity of husband and wife."[42] The common law has never recognized a distinct marital status of "cohabitant."

The principle that a court must not interpret a statute in a way that leads to an absurd result further bolsters this conclusion.[43] Cre-

34. *See id.* § 2.4, at 100.
35. *See id.* § 2.1, at 69-70.
36. *See id.* §2.4, at 104-05.
37. *See id.* at 105.
38. *See id.*
39. *See id.* at 108.
40. *See id.* § 2.3, at 85-97, § 2.4, at 101-03.
41. *See id.* § 2.4, at 101-04; *see also* HOMER H. CLARK, JR. & CAROL GLOWINSKY, CASES AND PROBLEMS ON DOMESTIC RELATIONS 95 (5th ed. 1995). The states are Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah.
42. Prince George's County v. Greenbelt Homes, Inc., 431 A.2d 745, 748 (Md. Ct. Spec. App. 1981); *see also* Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192, 1197 (Md. 1984).
43. *See* SINGER, *supra* note 14, § 46.07, at 126.

ating a marital status of cohabitant would lead to married couples having two marital statuses. To cohabit means to live together as husband and wife and also to live together in a sexual relationship when not legally married.[44] Thus, both married and unmarried couples who live together in a sexual relationship are cohabitants. A court should not adopt an interpretation that leads to the patent absurdity of married couples having the status of both "married" and "cohabitant."

Therefore, in jurisdictions where the statute proscribes marital status discrimination but does not define the operative phrase, cohabitants are not protected as a distinct marital status.[45]

b. Statutes Which Define "Marital Status"

In Illinois, Maryland, Minnesota and the District of Columbia, statutes prohibit marital status discrimination and define "marital status" as being either married, single, divorced, separated, or widowed.[46] These statutes plainly do not treat cohabitants as having a distinct marital status. In these states, as in the jurisdictions that do not define "marital status," the fair housing law does not protect unmarried couples as having a distinct marital status.[47]

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44. *See* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 279 (1984); *see also* BLACK'S LAW DICTIONARY 260 (6th ed. 1990)(defining "cohabitation" as "[t]o live together as husband and wife").

45. Even some critics of traditional marriage acknowledge that unmarried cohabitants do not have a distinct marital status. For example, one writer has urged the creation of a new legal status of "lawful" or "common law" cohabitation, whereby unmarried couples could register their relationship with the state and thereby receive benefits traditionally given only to spouses. *See* William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1678 (1984).

46. *See* D.C. CODE ANN. §§ 1-2501, 2502(17) (1992); 775 ILL. COMP. STAT. 5/1-102(A), 103(M)(West Supp. 1998); MD. ANN. CODE art. 49B, §§ 19(a), 20(n) (1994); MINN. STAT. ANN. §§ 363.01.24, 363.03.2(1)(a) (West 1991).

47. The courts in Illinois, Maryland and Minnesota have so held. *See* Jasniowski v. Rushing, 685 N.E.2d 622 (Ill. 1997)(vacating without opinion the appellate court's holding that landlord's refusal to rent to unmarried cohabitants was marital status discrimination); Mister v. A.R.K. Partnership, 553 N.E.2d 1152, 1159 (Ill. App. Ct. 1990)(landlord's refusal to rent to unmarried cohabitants was not marital status discrimination); Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192, 1196-98 (Md. 1984)(cooperative housing development's policy against cohabitation by unmarried couples was not marital status discrimination); Prince George's County v. Greenbelt Homes, Inc., 431 A.2d 745, 747-49 (Md. Ct. Spec. App. 1981)(policy against cohabitation was not marital status discrimination); State v. French, 460 N.W.2d 2, 4-8 (Minn. 1990)(landlord's refusal to rent to unmarried cohabitants was not marital status discrimination). As of this writing, there has been no reported decision on this issue in the District of Columbia.

Some conclusions are clear from the preceding discussion. In the thirty states that fall within the first two categories discussed above,[48] unmarried couples have no basis upon which to challenge a landlord's decision not to rent to them because they are not married. In the twenty-one jurisdictions that have laws generally proscribing marital status discrimination, unmarried couples do not have a distinct marital status and thus are not protected, as a class, from discrimination. In these twenty-one jurisdictions, if religious landlords commit marital status discrimination by not renting to these couples, it can only be because the landlords somehow discriminate against single people. As the next section explains, landlords do not discriminate against single people when they decide not to rent to unmarried couples.

B. The Fundamental Issue: Does a Landlord Discriminate Against Single Individuals by Not Renting to Unmarried Couples?

Although cohabitants do not have a unique marital status, the highest courts in Alaska, California, Massachusetts and Michigan have nevertheless held that landlords who will not rent to unmarried cohabitants discriminate on the basis of marital status.[49] These courts have reached this conclusion primarily for two reasons. First, even though the statute does not protect unmarried couples as a class, the landlord has supposedly discriminated against the prospective tenants because they are single. Second, because the statutes in those states forbid discrimination against persons as well as individuals, it is presumed that the legislature intended to protect unmarried couples. Although superficially appealing, neither argument withstands careful analysis.

1. *Purported Discrimination Against Single Tenants and the Status/Conduct Distinction*

In several cases in which a landlord has decided on religious grounds not to rent to an unmarried couple, the landlord has explicitly objected to fornication and/or cohabitation.[50] Because fornication and

48. *See supra* notes 11-23 and accompanying text.

49. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 914-15 (Cal. 1996)(plurality opinion); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998).

50. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 914-15 (Cal. 1996)(plurality opinion); Mister v. A.R.K. Partnership, 553 N.E.2d 1152, 1156 (Ill. App. Ct. 1990); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723, 725-27 (Mich. 1998); State v. French, 460 N.W.2d 2, 3-4 (Minn. 1990); County of Dane v. Norman, 497 N.W.2d 714, 714 (Wis. 1993).

cohabitation involve conduct, these landlords have argued that they have discriminated, if at all, on the basis of conduct and not status.[51]

Although some courts have accepted this argument,[52] others have rejected it,[53] relying on the following tidy syllogism. The landlord would not object if married couple "A" lived on the premises and had sex, and yet the landlord objects to unmarried couple "B" doing precisely the same thing. Because couple A and couple B will engage in the same conduct—cohabitation and sexual intercourse—on the premises, the only difference between the two couples is that one is married and the other is not. Thus, the reasoning goes, the landlord discriminates against single people.[54] The assumption in the syllogism that "sex is sex," however, is fundamentally flawed and contrary to common sense and experience.

The fatal flaw in this assumption can be shown through a series of illustrations. Assume there are two couples, A and B. Couple A is composed of a male and a female, A1 and A2, and couple B likewise is composed of a male and a female, B1 and B2. Couple A is married, lives in an apartment together, and has consensual marital sex on the premises. Couple B rents an apartment in the same complex and likewise engages in sex on the premises. Contrary to the "all sex is the same" assumption made by some courts, couple A and couple B only engage in objectively identical behavior if couple B is married and the conduct is consensual.

For example, if B2 is mentally impaired or for some other reason does not willingly consent to having sex with B1, then that sex is rape. If B1 or B2 is married to someone else, then couple B is committing adultery. If B2 is fourteen years old, then even if she willingly engages in sex with B1, he commits statutory rape, a pedophilic act. If B2 is dead when the sex act is committed, B1's behavior is criminal and necrophilic. If B2 is a ewe, B1's behavior is bestial. Likewise, if B1 and B2 are unmarried, they commit fornication, which is "sexual

51. *See, e.g.*, Mister v. A.R.K. Partnership, 553 N.E.2d 1152, 1156-59 (Ill. App. Ct. 1990); McCready v. Hoffius, 586 N.W.2d 723, 726-27 (Mich. 1998); State v. French, 460 N.W.2d 2, 4-6 (Minn. 1990); County of Dane v. Norman, 497 N.W.2d 714, 714-18 (Wis. 1993).

52. *See* Mister v. A.R.K. Partnership, 553 N.E.2d 1152 (Ill. App. Ct. 1990); State v. French, 460 N.W.2d 2 (Minn. 1990); County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993).

53. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996)(plurality opinion); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998).

54. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 915 (Cal. 1996)(plurality opinion); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723, 726-27 (Mich. 1998).

intercourse between a man and woman not married to each other,"[55] when they engage in that behavior on the premises. Married couple A cannot, by definition, engage in fornication. The courts that have ruled against the landlord have missed the basic point that *only* unmarried couples *can* engage in fornication.

On a purely anatomical level, the conduct of couple B in these illustrations (other than the extreme example involving the ewe) is the same as that of married couple A. But these illustrations show that *the different status of each couple makes their conduct fundamentally different.* This is true whether or not a statute proscribes fornication. For example, if B1 is married to C, then B1 and B2 in fact commit adultery when they have sexual intercourse on the premises regardless of whether adultery is a crime. Likewise, even if the state has decriminalized fornication, if B1 and B2 are not married, they are fornicating on the premises and their behavior is fundamentally different than that of couple A.

To further illustrate that the presumption that "all sex is equal" is fallacious, assume that couple B, like couple A, is married. Assume also that A1 and B2 decide to rent an apartment to facilitate their affair. Although the landlord clearly would not object to renting an apartment to couple A or to couple B, the landlord objects to renting to A1 and B2. Has the landlord committed marital status discrimination? The landlord is certainly not discriminating against single people because both A1 and B2 are married. Likewise, the landlord is not discriminating against married people because he would readily rent the apartment to either married couple. The prospective tenants may object that the landlord is discriminating against people living together and having sex when they are not married, but that is precisely the point. This landlord does not discriminate against married or single people but simply objects to the conduct of this couple. Any court that disagrees is clearly more concerned with imposing a permissive moral standard than with eliminating "invidious" discrimination based on immutable characteristics.[56] If the state does not prohibit fornication or adultery, couples may lawfully engage in that behavior, but they have no right to do so on the landlord's property.

It is illogical and indefensible to assert that a landlord discriminates on the basis of marital status discrimination by not renting to an unmarried couple. The landlord simply objects to, and discriminates on the basis of, the prospective tenants' conduct.[57] Instead of

55. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 499 (1984).

56. *See, e.g., infra* notes 416-19 and accompanying text (describing one judge's explicit statements to this effect).

57. *See* County of Dane v. Norman, 497 N.W.2d 714, 717 (Wis. 1993). It should be noted, however, that not all forms of discrimination are wrong. The verb "to discriminate" has two meanings: (1) to differentiate; and (2) to act on the basis of

treating people differently due to their status, these landlords apply the same standard to people of all marital statuses. The landlord will not rent to anyone, whether single, married, separated, divorced, or widowed, who intends to have sex outside of marriage on the premises. Unless the state makes it illegal to discriminate against tenants because they engage in non-marital sex, a questionable state action at best, the landlord is free to exclude tenants on this basis.

2. *Statutes Prohibiting Marital Status Discrimination Against "Persons"*

The courts that have ruled against the landlord have done so also because the applicable statute makes it illegal to discriminate against *persons* based on their marital status. These courts reason that the plural form of "person" reflects legislative intent to protect couples in addition to individuals.[58] Of course, this rationale cannot be applied if the statute does not include the plural form of "person."[59] Currently, statutes in seventeen states prohibit marital status discrimination against "persons" in housing transactions.[60]

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prejudice. *See* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 385 (1984). In this case, the landlord is simply differentiating based on fundamentally different conduct.

58. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994); Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1201-02 (Alaska 1989); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 914-15 (Cal. 1996)(plurality opinion); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994); Worcester Hous. Auth. v. Mass. Comm'n Against Discrimination, 547 N.E.2d 43, 45 (Mass. 1989).

59. *See, e.g.*, State v. French, 460 N.W.2d 2, 6 (Minn. 1990)(by referring to a person, "the legislature intended to address only the status of an *individual*, not an individual's relationship with . . . a domestic partner").

60. Of the jurisdictions in which marital status discrimination is proscribed in lease transactions, statutes in five states expressly prohibit marital status discrimination against "persons." *See* MASS. GEN. LAWS ch. 151B, § 4 (1996); MINN. STAT. §363.03 (Supp. 1997); N.J. STAT. ANN. §10:5-12 (West Supp. 1998); N.Y. EXEC. LAW §296(5) (McKinney 1993); WIS. STAT. §106.04 (1995-96). Statutes in twelve other of these states protect a "person" or "person residing with that person," but define "person" in its plural form. *See* ALASKA STAT. §§ 18.80.240, 18.80.300(11) (1996) (person defined as "one or more individuals"); CAL. GOV'T CODE §§ 12927(f), 12955 (West Supp. 1998)(defined as "all individuals"); COLO. REV. STAT. §§ 24-34-301(5) to -502 (1997)(defined as "one or more individuals"); DEL. CODE ANN. tit. 6, §§ 4602(19), 4603 (1993)(defined as "one or more individuals"); HAW. REV. STAT. §§ 1-19, 515-3 (1993)(defined as "individuals"); 755 ILL. COMP. STAT. 5/3-102, 5/1-103(L) (West 1996)(defined as "one or more individuals"); MD. ANN. CODE art. 49B, §§ 20, 22 (1994)(defined as "one or more individuals"); MICH. STAT. ANN. § 3.548(502) (Law Co-op 1996)("person or person residing with that person"); MONT. CODE ANN. § 49-2-101, -305(1)(b) (1997)(defined as "one or more individuals"); N.H. REV. STAT. ANN. §§ 354-A:2, A:10 (1995 & Supp. 1997)(defined as "one or more individuals"); R.I. GEN. LAWS §§ 34-37-3, -4 (Supp. 1997)(defined as "one or more individuals"); WASH. REV. CODE §§ 49.60.040(1), 49.60.222 (Supp. 1997)(defined as "one or more individuals").

Even if a statute protects "persons" from marital status discrimination, there are two flaws in the assumption that this word inherently protects unmarried cohabitants. First, as we have just seen, the underlying premise that the landlord discriminates on the basis of status and not conduct is false.

Second, it is not necessarily true that, by using the word "persons," the legislature intended to protect couples. Each statute must be construed according to its own history and wording, and the text of the statute and legislative history may reveal legislative intent to protect couples. However, by referring to "persons," the legislature may simply intend to protect more than one person from a specific act of discrimination, and not necessarily to protect couples per se. For example, in *Zahorian v. Russell Fitt Real Estate Agency*,[61] a landlord was accused of marital status discrimination for refusing to rent an apartment to two unmarried female friends. The New Jersey legislature had amended the state fair housing law in 1970 to prohibit a real estate broker from refusing a rental to any "person or group of persons" because of marital status.[62] In upholding a judgment against the landlord, the court noted that the legislature intended to protect two or more persons "of the same sex who constituted themselves into a housekeeping unit."[63] *Zahorian* illustrates that legislative use of the term "persons" does not necessarily indicate intent to protect unmarried cohabitants.

There is no legitimate basis under existing law to conclude that a landlord who excludes unmarried cohabitants commits marital status discrimination. If a legislature desires to protect unmarried cohabitants, it must indicate so clearly—a relatively simple task.[64] Unless and until the legislature enacts such legislation, the courts have no legitimate basis upon which to rule for the tenants in these disputes.[65]

C. Public Policy Issues

Even if a current state statute could be properly interpreted to protect unmarried cohabitants from marital status discrimination, there are sound public policy reasons why a court should not presume legislative intent to do so.

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61. 301 A.2d 754 (N.J. 1973).

62. *Id.* at 757.

63. *Id.*

64. *See, e.g.,* County of Dane v. Norman, 497 N.W.2d 714, 715 (Wis. 1993)(dispute involving an ordinance which listed "cohabitant" as a marital status).

65. Even if the legislature enacts such explicit legislation, it may properly do so only if circumstances justify such an exercise of the state's police power. *See infra* Part III.

1. Promotion of Marriage

A court should construe the law to further the policy of promoting the institution of marriage. The United States Supreme Court has recognized that "[m]arriage . . . creat[es] the most important relation in life . . . [and] ha[s] more to do with the morals and civilization of a people than any other institution . . . ."[66] Moreover, the court characterized marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[67]

Treating unmarried cohabitation as equivalent to marriage degrades the institution of marriage.[68] The requirement of more than cohabitation to establish a marital relationship,[69] and the benefits given to spouses that are not given to unmarried couples,[70] demonstrate the state's interest in protecting the institution of marriage. Although the state may have defensible reasons to decriminalize illicit cohabitation, there is no apparent reason to protect and support it, at least not in the absence of a transition to a completely libertarian society.

> There are certain moral values and institutions that have served western civilization well for eons .... Before abandoning fundamental values and institutions, we must pause and take stock of our present social order: millions of drug abusers; rampant child abuse; a rising underclass without marketable job skills; children roaming the streets; children with only one parent or no parent at all; and children growing up with no one to guide them in developing any set of values .... How can we expect anything else when the state itself contributes, by arguments [that landlords who exclude unmarried cohabitants must be prosecuted], to the further erosion of fundamental institutions that have formed the foundation of our civilization for centuries?[71]

Unfortunately, the courts that have punished religious landlords for excluding unmarried couples have inexplicably abandoned their traditional support of marriage in favor of sanctioning informal sexual unions.

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66. Maynard v. Hill, 125 U.S. 190, 205 (1888).

67. *Id.* at 211.

68. *See* Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192, 1197 (Md. 1984).

69. *See supra* notes 30-42 and accompanying text.

70. *See, e.g., infra* note 384 and accompanying text.

71. State v. French, 460 N.W.2d 2, 11 (Minn. 1990); *see also* County of Dane v. Norman, 497 N.W.2d 714, 716 (Wis. 1993)(requiring landlords to rent to unmarried cohabitants "is inconsistent with the public policy of this state which seeks to promote the stability of marriage and family").

2. Existing Prohibitions Against Fornication and Cohabitation

Several jurisdictions criminalize either fornication or unmarried cohabitation or both.[72] In these jurisdictions, the court cannot properly interpret a fair housing law to protect conduct that the state criminalizes. Several courts have ruled for the landlord in part because a fornication or cohabitation statute reflected the state's policy of discouraging such behavior.[73] Even if the legislature subsequently repealed the fornication and cohabitation statutes, the fact that such a statute existed when the marital status provision was enacted demonstrates that the legislature could not have intended to protect unmarried couples.[74] When interpreting a statute, the court must determine

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72. In those states that prohibit marital status discrimination, three have statutes that criminalize fornication. *See* 720 ILL. COMP. STAT. 5/11-8 (West 1996); MASS. GEN. LAWS ch. 272, § 18 (1996); MINN. STAT. § 609.34 (1996). One has a statute that criminalizes unmarried cohabitation. *See* MICH. STAT. ANN. § 28.567 (Law Co-op 1990). Of the states that have fair housing laws that do not prohibit marital status discrimination, nine have statutes that criminalize fornication. *See* GA. CODE ANN. § 16-6-18 (1996); IDAHO CODE § 18-6603 (1997); MISS. CODE ANN. § 97-29-1 (1994); N.C. GEN. STAT. § 14-184 (1993); N.D. CENT. CODE § 12.1-20-08 (1997); S.C. CODE ANN. § 16-15-60 (Law. Co-op. 1985); UTAH CODE ANN. § 76-7-104 (1995); VA. CODE ANN. § 18.2-344 (Michie 1996); W. VA. CODE § 61-8-3 (1997). In Pennsylvania, any person who maintains a building or part of a building used for the purposes of fornication shall be guilty of a misdemeanor. *See* PA. STAT. ANN. tit. 68, § 467 (West 1994). Of those states that do not prohibit marital status discrimination, seven also criminalize unmarried cohabitation. *See* ARIZ. REV. STAT. ANN. § 13-1409 (West 1989); FLA. STAT. ch. 789.02 (1997); MISS. CODE ANN. § 97-29-1 (1994); N.M. STAT. ANN. § 30-10-2 (Michie 1994); N.D. CENT. CODE § 12.1-20-10 (1997); VA. CODE ANN. § 18.2-345 (Michie 1996); W. VA. CODE § 61-8-4 (1997). These statutory prohibitions preserve the common law prescription against sex outside of legal marriage. *See* CLARK, *supra* note 30, § 2.1, at 72 (noting that at common law sexual relations were only permitted between husband and wife). The definition of "illicit cohabitation" demonstrates this point:

> The living together as man and wife of two persons who are not lawfully married, with the implication that they habitually practice fornication. At common law and by statutes in many states, living together either in adultery or fornication is a crime, though at common law such cohabitation had to be open and notorious so as to cause a public scandal . . . .

BLACK'S LAW DICTIONARY 748 (6th ed. 1990).

73. *See* Mister v. A.R.K. Partnership, 553 N.E.2d 1152, 1157 (Ill. App. Ct. 1990); State v. French, 460 N.W.2d 2, 5-7 (Minn. 1990); McFadden v. Elma Country Club, 613 P.2d 146, 150-51 (Wash. Ct. App. 1980). *Cf.* Attorney Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994)(noting that, although the Massachusetts fornication statute was of "doubtful constitutionality" in some contexts, the statute undermined the state's argument that it had a compelling interest in forcing landlords to rent to unmarried cohabitants). *But see* McCready v. Hoffius, 586 N.W.2d 723, 727-28 (Mich. 1998)(summarily dismissing argument that unmarried cohabitants would engage in "lewd and lascivious conduct" without defining that phrase).

74. *See* Mister v. A.R.K. Partnership, 533 N.E.2d 1152, 1157-58 (Ill. App. Ct. 1990)(holding that statute did not protect unmarried cohabitants even though the legislature subsequently decriminalized cohabitation); McFadden v. Elma

what the legislature intended the statute to mean when it was adopted.[75] It is inappropriate for the court to reword a statute due to subsequent events or the court's own preferences.[76] If fornication or cohabitation was illegal at the time the legislature proscribed marital status discrimination in housing, then it must be presumed that the legislature did not intend the fair housing law to protect couples who engage in such conduct.

3. *The Effect of the Repeal of Fornication and Cohabitation Statutes*

Even in states where fornication and cohabitation are not illegal, no legislature has ever expressed an interest in *promoting* or *protecting* such behavior.[77] Some courts have suggested that the legislature's decision to repeal the fornication and cohabitation statutes indicates the intent to protect such conduct.[78] The assumption that the state must either fully condemn or support certain behavior is demonstrably false. Criminalizing particular conduct certainly reflects state disapproval. However, decriminalizing the same conduct may simply reflect that the state no longer desires to prosecute it. For example, even though many states have repealed statutes that criminalized adultery, it would be indefensible to suggest that the repeal necessarily indicates state support and promotion of adultery. Similarly, the fact that the state prosecutes people for lying only in limited

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Country Club, 613 P.2d 146, 150 (Wash. Ct. App. 1980)("The existence of the illegal cohabitation statute for 3 years after the amendment of [the anti-discrimination statute] would seem to vitiate any argument that the legislature intended 'marital status' discrimination to include discrimination on the basis of a couple's unwed cohabitation.").

75. *See* SINGER, *supra* note 14, § 45.05, at 22-23.

76. *See id.* In *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989), the Supreme Court of Alaska overlooked these canons of statutory construction. In 1975, the Alaska legislature adopted a statute that prohibited marital status discrimination in housing. In 1978, the legislature repealed the statute that made it a crime for unmarried couples to live together. The court in *Foreman* held that "it would be manifestly unreasonable to limit the effect of [the marital status provision] by reference to an outdated criminal statute which was [subsequently] repealed." *Id.* at 1202. The court ignored that its task was to discern the legislature's intent when the statute was enacted, not what the legislature might have intended at some later point. Also, if the legislature intended to protect cohabitants, it could have easily amended the fair housing law to provide such protection explicitly, just as it amended the criminal code by abolishing the statute that prohibited illicit cohabitation.

77. *See* McFadden v. Elma Country Club, 613 P.2d 146, 152 (Wash. Ct. App. 1980)("[W]e can perceive no public policy for protection of [unmarried cohabitation] even though it appears to be more widely tolerated than in the past.").

78. *See, e.g.*, Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1202 (Alaska 1989); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 917-18 (Cal. 1996)(plurality opinion); Jasniowski v. Rushing, 678 N.E.2d 743, 747 (Ill. App. Ct. 1997), *vacated*, 685 N.E.2d 622 (Ill. 1997).

circumstances (e.g., perjury, false tax returns, etc.) does not suggest state promotion of lying in all other contexts.

The legislature's repeal of the fornication and cohabitation statutes can at most be presumed to indicate that the state desires neither to condemn nor to promote such conduct.

> Such a stance expresses neither approval nor disapproval of discreet cohabitation; couples who wish to live together without being married can certainly still do so, but they must find a landlord who does not object to the arrangement. . . . This position is entirely consistent with the State's dichotomous public policy on cohabitation, which is to respect "purely private relationships" without debasing "public morality."
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> . . . [T]he legislature was not limited to either outlawing such practices or affording them a protected status under the law. A vast middle ground exists wherein such conduct might be neither prohibited by the State nor protected from private disapprobation.[79]

There is, in short, no sound basis for courts to rule that any current state fair housing law prohibits landlords from excluding unmarried couples. Unless and until a state legislature explicitly protects such couples in housing transactions, landlords should be free to decide not to rent to them.[80]

III. POLICE POWER ISSUES

A. An Overview of the Principles Governing the State's Police Power

Even if a statute explicitly protects unmarried couples from discrimination in the rental housing market, the statute is not valid unless the state was justified in exercising its police power to enact it. In the post-New Deal era, courts and commentators have often assumed that the state can regulate virtually at whim. Even under the current view of the state's police power, this assumption is not true. There are well-established, necessary limits on the state's police power. In this

79. Mister v. A.R.K. Partnership, 553 N.E.2d 1152, 1158 (Ill. App. Ct. 1990)(citation omitted).

80. The statutory construction principle that remedial statutes are generally to be construed liberally does not contradict this conclusion. There are two reasons why this is so. First, this principle does not apply to statutes in derogation of the common law; such statutes must be strictly construed. *See* SINGER, *supra* note 13, §60.01, at 148. Statutes proscribing marital status discrimination in leasing alter the common law rule which gives landlords absolute discretion in selecting tenants. *See supra* notes 16-20 and accompanying text. Second, the principle of liberal construction of remedial statutes favors only those whom the statute was designed to protect. *See* SINGER, *supra* note 14, §60.01, at 147 ("A court cannot go beyond reasonable bounds in applying the liberal construction in order to stay within the prerogatives of the legislature."); Mister v. A.R.K. Partnership, 553 N.E.2d 1152, 1159 (Ill. App. Ct. 1990). As the discussion in Part II *supra* demonstrates, no current state fair housing law can be properly construed to protect unmarried cohabitants.

case, the state cannot legitimately force landlords to rent to unmarried couples unless unmarried couples in that jurisdiction face a housing shortage that cannot be eliminated without legislation.

Ultimately, state law defines the limits of the state's police power. Nevertheless, there are generally accepted principles governing this area of law. The state may enact legislation essential to the public health, safety, and welfare.[81] All state laws carry a presumption of legitimacy, and the party challenging a statute bears the burden of proving its invalidity.[82] Although state law governs police power issues, an illegitimate exercise of the police power deprives affected citizens of due process and thus must be invalidated.[83]

The United States Supreme Court has defined the limits of the state's police power as follows:

> To justify the state in . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.[84]

This definition reveals several requisites for a legitimate exercise of the police power, including the requirement of *necessity*, whereby the law must be necessary to protect the public good.[85] Earlier in this century, only emergency circumstances satisfied this necessity test.[86] A reasonableness standard has since replaced the emergency requirement.[87]

Although the legislature's assessment of necessity is presumed valid and thus is entitled to some deference, the legislature's mere assertion that a law is necessary does not satisfy the necessity require-

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81. *See* 16A AM. JUR. 2d *Constitutional Law* § 363 (1979).
82. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962).
83. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 197 (1985).
84. Lawton v. Steele, 152 U.S. 133, 137 (1894), *quoted with approval in* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962).
85. *See* 16A AM. JUR. 2d *Constitutional Law* §§ 363, 370 (1979).
86. *See, e.g.,* Chastleton Corp. v. Sinclair, 264 U.S. 543, 548-49 (1924)(noting that while rent controls were necessary during a period of war emergency, the restrictions would no longer be valid once the emergency situation ceased); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 245 (1922)(defining an emergency as a condition "so grave that it constitute[s] a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the state"); Block v. Hirsch, 256 U.S. 135, 154-55 (1921)(noting that rent controls were necessary due to the emergencies caused by war).
87. *See, e.g.,* Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1018-23 (Cal. 1976); 16A AM. JUR. 2d *Constitutional Law* § 387 (1979).

ment.[88] The Supreme Court has made this point clear in the related area of takings:

> In [Justice Blackmun's dissenting] view, . . . the test for required compensation [under the takings clause] is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.[89]

Likewise, in the police power context, the state may not rely on naked ipse dixits to justify its action.[90] Rather, there must be evidence demonstrating that the state action is necessary. A party challenging state action can prevail by showing that there are no facts to justify the state action.[91] Although most laws survive challenges based upon the state's police power, modern courts do invalidate unnecessary laws that exceed the scope of the police power.[92]

The Supreme Court of California's decision in *Birkenfeld v. City of Berkeley*[93] provides an excellent illustration of how these police power principles apply in the context of landlord and tenant law. In

88. *See* Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); 16A AM. JUR. 2d *Constitutional Law* §§ 387, 388 (1979).

89. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 n.12 (1992)(citation omitted).

90. *See, e.g.,* Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987)(rejecting "the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights"); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926)(a law which has "the character of a merely arbitrary fiat" is not a legitimate exercise of the police power); 16A AM. JUR. 2d *Constitutional Law* § 387 (1979)("The mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not in itself bring that statute within the police power of a state . . . .").

91. *See* Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1019 (Cal. 1976).

92. *See, e.g.,* Nollan v. California Coastal Comm'n, 483 U.S. 825, 839-40 (1987)(rejecting the state's justification for a permit condition and citing twenty-three lower federal and state cases that reached a similar holding); Fay v. City of Chicago, 390 N.E.2d 125 (Ill. App. Ct. 1979)(striking an ordinance as an invalid exercise of police power); Little v. Winborn, 518 N.W.2d 384 (Iowa 1994)(striking ordinance as an invalid exercise of police power); LaFourche Parish Council v. Autin, 648 So. 2d 343 (La. 1994)(holding that a state statute which gave municipalities certain appointment powers was an invalid exercise of police power); Whitehead Oil Co. v. City of Lincoln, 245 Neb. 660, 515 N.W.2d 390 (1994)(striking zoning ordinance as an invalid exercise of police power); Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne, 270 A.2d 628 (N.J. 1970)(invalidating an ordinance which restricted the ability of women to work in taverns); Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y. 1976)(striking zoning ordinance as an invalid exercise of police power); Mahoney v. Township of Hampton, 651 A.2d 525 (Pa. 1994)(striking zoning ordinance as an invalid exercise of police power); L.A. Ray Realty v. Town Council, 698 A.2d 202 (R.I. 1997)(striking zoning ordinance as an invalid exercise of police power); County of Spokane v. Valu-Mart, Inc., 419 P.2d 993 (Wash. 1966)(holding that an ordinance affecting Sunday business was an invalid exercise of police power).

93. 550 P.2d 1001 (Cal. 1976).

Birkenfeld, owners of rental property challenged a rent control ordinance, arguing that the ordinance was illegitimate in the absence of an emergency or a condition that constituted a "serious menace" to the safety of a large portion of the citizens.[94] Surveying the law, the California Supreme Court rejected the emergency doctrine, holding that the appropriate test was whether the law or ordinance reasonably relates to a legitimate governmental purpose.[95] Nevertheless, the court explicitly rejected the government's argument that it could establish necessity by mere assertion:

> [T]he constitutionality of residential rent controls under the police power depends upon *the actual existence of a housing shortage and its concomitant ill effects of sufficient seriousness* to make rent control a rational curative measure. Although the existence of constitutional facts upon which the validity of an enactment depends is presumed in the absence of any showing to the contrary, their nonexistence can properly be established by proof.[96]

The city offered extensive evidence of the shortage of affordable housing for low-income, aged, and disabled residents. The property owners countered by showing that housing conditions had improved statewide in recent years, low-income housing was available in other California cities, and the housing problems in Berkeley were no worse than in other metropolitan areas. The court held that the necessity requirement was met because the evidence of a housing shortage for disadvantaged Berkeley residents was clear, and the city had the power to safeguard and promote the welfare of people who chose to live in its boundaries.[97] Thus, the state may alter the landlord and tenant relationship only when there are facts, not mere assertions, to establish that the law is necessary.

B. Circumstances Required to Justify Forcing Landlords to Rent to Unmarried Couples

There is currently no credible evidence that demonstrates unmarried couples face such unfavorable conditions in the rental market that the state may protect them. As *Birkenfeld* reflects, the state cannot force landlords to rent to unmarried couples unless they face a housing shortage that threatens the public welfare.[98] No legislature has explicitly protected such couples in the rental market, nor has any legislature specifically found that unmarried couples face a shortage of rental housing. The state actors that have sought to punish landlords for not renting to unmarried cohabitants have simply offered na-

94. *See id.* at 1018-19.
95. *See id.* at 1018-23.
96. *Id.* at 1024 (emphasis added)(citations omitted).
97. *See id.* at 1024-26.
98. *See id.* at 1024.

ked assertions that it is necessary to do so.[99] Only the Alaska and Michigan Supreme Courts have accepted this naked assertion offered by the state or prospective tenants.[100] As we have seen, the landlord's conduct is in fact not improperly discriminatory,[101] but even if it were, the state's unsubstantiated claims alone cannot justify state action to protect unmarried cohabitants.[102] A landlord defending against such a claim can challenge the law successfully by showing that such couples do not face housing shortages, and thus the state has no authority to protect them.[103]

Commentators have offered several unconvincing arguments to try to fill the void in the state's argument. Professor Maureen Markey offers the standard justification for forcing religious landlords to rent to unmarried cohabitants.[104] She notes the dramatic increase in unmarried cohabitation since 1960: an increase of 800 percent from 1960 to 1970, and another six-fold increase from 1970 to 1992.[105] Based on these statistics, she asserts that "[b]oth judicial recognition of the societal trend and judicial concern for protecting the legislatively mandated rights of such a large and growing segment of the population are important."[106]

Assuming for the sake of argument that Professor Markey is correct that such "rights" have been legislatively mandated and are important, she commits two logical fallacies in this argument. The first is *argumentum ad populum*, or appeal to popular opinion. The mere fact that certain behavior is widely accepted or engaged in does not justify that behavior or the state's sanctioning of it. For example, the fact that an overwhelming majority of Southerners supported slavery over a century ago did not justify laws institutionalizing slavery.

Moreover, her conclusion is a *non sequitur*. The mere fact that there are increasing numbers of unmarried cohabitants does not mean that they, as a class, face discrimination that undermines their ability to obtain housing. For example, civil rights laws protecting minorities were necessary not because of the number of minorities, but because of the deplorable and well-documented history of racial discrimination

99. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282-83 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 929 n.21 (Cal. 1996)(plurality opinion); Attorney Gen. v. Desilets, 636 N.E.2d 233, 238 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998); State v. French, 460 N.W.2d 2, 9-11 (Minn. 1990).

100. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282-83 (Alaska 1994); McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998).

101. *See supra* notes 50-57 and accompanying text.

102. *See supra* notes 88-97 and accompanying text.

103. *See* Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1024 (Cal. 1976).

104. *See* Markey, *The Price*, *supra* note 6, at 740.

105. *See id.*

106. *Id.* at 743.

in this country and the resulting threat that discrimination posed to our public welfare.

Professor Markey's statistical evidence actually undermines her conclusion. Assume, for the sake of argument, that she is correct "that the majority of the population do not find unmarried cohabitation immoral,"[107] and that "[t]he growing public acceptance of unmarried cohabitation is pervasive."[108] Assume further that she is correct that "despite some adverse court decisions regarding their rights, the numbers of unmarried couples are growing and will continue to grow."[109] If these points are true, they actually show that unmarried couples require no state protection. Presumably, landlords' views mirror those of the populace at large. If most landlords approve of unmarried cohabitation, then unmarried couples will have no trouble finding adequate housing. If increasing percentages of Americans will continue to support unmarried cohabitation, the number of landlords who will rent to such couples will continue to increase proportionately. Thus, the evidence suggests there is no "actual . . . housing shortage . . . of sufficient seriousness"[110] to justify state action. Based on this statistical evidence, the state is no more justified in protecting unmarried couples in the housing market now than it would have been in enacting civil rights laws to protect non-minorities in the 1960's.

One student commentator leaped from Professor Markey's conclusions to the patently inconsistent proposition that discrimination against unmarried couples is widespread.[111] To support this conclusion, this student offered only two facts: first, in a four-year period in the late 1980s, there were sixty-two complaints of marital status discrimination in the city of Los Angeles, or an average of 15.5 complaints per year; second, in 1989, there were approximately eighty-five complaints of marital status discrimination in all of California.[112] These numbers are misleading because they reflect *all* claims of marital status discrimination, including, for example, alleged discrimination against married couples, and not just claims by unmarried cohabitants. Therefore, they potentially overstate the extent of alleged discrimination against unmarried couples. Moreover, these figures only demonstrate the number of complaints filed and do not reflect whether the complaints were legitimate. Nevertheless, despite their shortcomings, these figures actually prove that religious landlords pose no tangible threat to the ability of unmarried couples to find suitable housing. In 1990, Los Angeles had a population of

107. *Id.* at 741.
108. *Id.*
109. *Id.* at 743.
110. Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1024 (Cal. 1976).
111. *See* Anderson, *supra* note 6, at 1018 n.10.
112. *See id.*

3,486,000.[113] Given that the city averaged only 15.5 complaints of marital status discrimination per year at approximately the same time, the ratio of complaints to the population was 1:224,903. The number of complaints statewide in California at the same time was proportionately even smaller. California had a population of 29,218,000 in 1989.[114] The ratio of marital status discrimination complaints to the population statewide was thus only 1:343,741.

Although it is impossible to determine precisely how often landlords exclude unmarried couples, some other statistics are enlightening. State legislatures began enacting fair housing laws in the late 1960s and early 1970s. In the three decades since then, there have been only *seventeen* published decisions across the country involving allegations of marital status discrimination against unmarried couples in housing transactions.[115] Of those cases, only *twelve* involved alleged discrimination by private landlords,[116] and of those twelve landlords, religious objections motivated only *eight* of them.[117]

113. *See* BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 46 (1997).

114. *See id.* at 28.

115. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337 (9th Cir. Jan. 14, 1999); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996)(plurality opinion); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Ct. App. 1991), *review granted*, 825 P.2d 766 (Cal. 1992), *review dismissed*, 859 P.2d 671 (Cal. 1993)(not published in official reporter and cannot be cited in California); Hess v. Fair Employment & Hous. Comm'n, 187 Cal. Rptr. 712 (Ct. App. 1982); Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375 (Ct. App. 1976); Jasniowski v. Rushing, 678 N.E.2d 743 (Ill. App. Ct. 1997), *vacated*, 685 N.E.2d 622 (Ill. 1997); Mister v. A.R.K. Partnership, 553 N.E.2d 1152 (Ill. App. Ct. 1990); Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192 (Md. 1984); Prince George's County v. Greenbelt Homes, Inc., 431 A.2d 745 (Md. Ct. Spec. App. 1981); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994); Worcester Hous. Auth. v. Massachusetts Comm'n Against Discrimination, 547 N.E.2d 43 (Mass. 1989); McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998); State v. French, 460 N.W.2d 2 (Minn. 1990); Hudson View Properties v. Weiss, 450 N.E.2d 234 (N.Y. 1983); McFadden v. Elma Country Club, 613 P.2d 146 (Wash. Ct. App. 1980).

116. The following cases did not involve private landlord and tenant disputes: Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375, 377 (Ct. App. 1976)(public housing); Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192, 1193 (Md. 1984)(cooperative housing development); Prince George's County v. Greenbelt Homes, Inc., 431 A.2d 745, 746 (Md. Ct. Spec. App. 1981)(cooperative housing development); Worcester Hous. Auth. V. Massachusetts Comm'n Against Discrimination, 547 N.E.2d 43, 45 (Mass. 1989)(public housing); McFadden v. Elma Country Club, 613 P.2d 146, 148 (Wash. Ct. App. 1980)(membership in a country club that included the privilege of property ownership in the community).

117. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *1 (9th Cir. Jan. 14, 1999); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276-77 (Alaska 1994); Smith v. Fair Employment & Hous.

Perhaps most significantly, courts have issued published decisions resolving these disputes in only nine of the twenty-one jurisdictions in which marital status discrimination is generally prohibited.[118] Thus, there are no reported decisions involving such disputes in twelve of the twenty-one jurisdictions that have statutes generally proscribing marital status discrimination.[119]

Given that landlords have no economic incentive to exclude unmarried couples, it is not surprising that very few landlords do so. If unmarried couples are as numerous as the statistics suggest,[120] then landlords who refuse to rent to them will significantly limit their pool of prospective tenants. This substantial market reduction will tend to deflate the reasonable rent the landlord will be able to command on the market.[121] Moreover, if the state prosecutes the landlord for committing marital status discrimination, the landlord will face significant civil and criminal penalties, attorney's fees, court costs, and possibly even prison time.[122] Given these daunting disincentives, it is not surprising that so few landlords, even those who are devoutly religious, refuse to rent to unmarried couples.

The final justification offered for protecting unmarried cohabitants is that prospective tenants should be able to live where they choose.[123]

Comm'n, 913 P.2d 909, 912 (Cal. 1996) (plurality opinion); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 (Ct. App. 1991), *review granted*, 825 P.2d 766 (Cal. 1992), *review dismissed*, 859 P.2d 671 (Cal. 1993) (not published in official reporter and cannot be cited in California); Jasniowski v. Rushing, 678 N.E.2d 743, 745 (Ill. App. Ct. 1997), *vacated*, 685 N.E.2d 622 (Ill. 1997); Attorney Gen. v. Desilets, 636 N.E.2d 233, 234 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723, 725 (Mich. 1998); State v. French, 460 N.W.2d 2, 3-4 (Minn. 1990). In *Mister*, the landlords claimed on appeal that their refusal to rent to an unmarried couple was motivated by religious beliefs, but the Appellate Court of Illinois refused to consider this issue because there was no evidence in the record to support it. *See* Mister v. A.R.K. Partnership, 553 N.E.2d 1152, 1154 (Ill. App. Ct. 1990).

118. *Compare supra* note 115 *with supra* notes 24 & 46.

119. Those jurisdictions are Colorado, Delaware, the District of Columbia, Hawaii, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Rhode Island, Vermont, and Washington. *See supra* note 118 and accompanying text.

120. *See supra* note 105 and accompanying text.

121. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 954 (Cal. 1996)(Kennard, J., concurring and dissenting); Attorney Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994). *Cf.* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337 at *17 (9th Cir. Jan. 14, 1999)(noting that a landlord who objects to renting to unmarried cohabitants "has a distinct economic disincentive to speak up" about his views).

122. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 954 (Cal. 1996)(Kennard, J., concurring and dissenting); Attorney Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994).

123. *See* Markey, *The Price*, *supra* note 6, at 795 (noting that allowing landlords to exclude unmarried couples "results in direct and immediate harm" to those couples); Anderson, *supra* note 6, at 1018 n.10 (using anecdotal evidence of two landlords who would not rent to a few unmarried couples to justify laws protect-

Commentators never identify the source of this alleged right. The common law, which gave the landlord complete discretion in selecting tenants,[124] certainly did not provide it. As the United States Supreme Court has explained, the Constitution likewise does not give citizens the right to live wherever they choose:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease . . . .[125]

Any such right can, therefore, only exist as a matter of legislative grace. "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions."[126] However, the legislature cannot act beyond the scope of its police power. Thus, the argument that prospective tenants have a right to the housing of their choice is entirely circular. The fundamental question is whether the state may properly legislate such a right. As we have seen, there is currently no police power justification for giving unmarried couples the right to live wherever they choose.

If the state can create a housing right for unmarried couples who face no housing shortage, there are no practical limits to state authority. For example, what would stop the state from proscribing "pecuniary status discrimination" in housing transactions, i.e., discrimination based on the tenant's ability to pay the rent? Absent a complete transformation to a totalitarian government, the state has no authority to enact such legislation that would unnecessarily infringe upon the property rights of landlords.

There is no credible evidence that religious landlords pose any tangible threat to unmarried cohabitants. This lack of evidence explains why no legislature has yet expressly protected unmarried cohabitants in housing transactions. If unmarried cohabitants truly face housing shortages because landlords will not rent to them, then the legislature can remedy that shortage through exercise of its police power so long as that exercise does not conflict with existing laws and policies.[127] In

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ing such couples); Eckel, *supra* note 6, at 813 (referring to "the interests of prospective tenants who enter the marketplace and expect to choose freely where to live").

124. *See* CRIBBET & JOHNSON, *supra* note 16, at 241.

125. Lindsey v. Normet, 405 U.S. 56, 74 (1972).

126. *Id.*

127. *See supra* notes 66-80 and accompanying text (discussing the public policy reasons why states should not protect unmarried cohabitants in housing transactions).

the absence of evidence of such a shortage, the state may not force landlords to rent to couples who choose to cohabit without marrying.

IV. CONSTITUTIONAL AVENUES TO STRICT SCRUTINY REVIEW

Even if circumstances justify the state forcing landlords to rent to unmarried cohabitants, a landlord may have valid constitutional objections to the law. In each case where the landlord has raised a constitutional challenge to a claim of marital status discrimination, the landlord has sought to protect his right to the free exercise of religion.[128] Accordingly, the analytical starting point is the Free Exercise Clause of the First Amendment.

A. Federal Free Exercise/Establishment Clause Claims

1. Overview of the Free Exercise Clause

The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[129] These few words have generated significant controversy. The Supreme Court's free exercise jurisprudence has been unpredictable and inconsistent. Not surprisingly, it has come under regular scholarly attack. One commentator has observed that the "Court's recent decisions on the rights of religious minorities in America . . . [have] evoked withering attacks in the popular and professional media. The Court's entire record on religious liberty has become vilified for its lack of consistent and coherent principles and its uncritical use of mechanical tests and empty metaphors."[130] Other commentators have noted that

> Religion Clause jurisprudence . . . has been described on all sides, and even by Justices themselves, as unprincipled, incoherent, and unworkable . . . . [T]he Court must now grapple seriously with the formidable interpretive problems that were overlooked or given short shrift in the past. The task is an urgent

128. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276-77 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 912 (Cal. 1996)(plurality opinion); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 (Ct. App. 1991), *review granted*, 825 P.2d 766 (Cal. 1992), *review dismissed*, 859 P.2d 671 (Cal. 1993)(not published in official reporter and cannot be cited in California); Jasniowski v. Rushing, 678 N.E.2d 743, 745 (Ill. App. Ct.), *vacated*, 685 N.E.2d 622 (Ill. 1997); Attorney Gen. v. Desilets, 636 N.E.2d 233, 234 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723, 725 (Mich. 1998); State v. French, 460 N.W.2d 2, 3-4 (Minn. 1990).

129. U.S. CONST. amend. I.

130. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 374 (1996).

> one, for it concerns nothing less than the cultural foundations of our experiment in ordered liberty.[131]

Whatever one thinks of the Court's interpretation of the Free Exercise Clause, the principles that currently govern this area of law are relatively straightforward. To understand these principles, it is necessary to review the development of the Court's free exercise jurisprudence.

The Framers envisioned that the First Amendment would govern a predominantly Christian nation. As Professor Michael McConnell commented:

> It is a mistake to read the religion clauses under the now prevalent assumption that the governing intellectual climate of the late eighteenth century was that of deism . . . . America was in the wake of a great religious revival. . . . [T]he Enlightenment world view excludes many, probably most, people who lived in America in the eighteenth and nineteenth centuries. To determine the meaning of the religion clauses, it is necessary to see them through the eyes of their proponents, most of whom were members of the most fervent and evangelical denominations in the nation.[132]

This Christian worldview was exemplified by Patrick Henry, who said that "[i]t cannot be emphasized too strongly or too often that this great nation was founded, not by religionists, but by Christians; not on religions, but on the gospel of Jesus Christ."[133]

Although predominantly Christian, the Framers practiced their faith in diverse expressions. The Framers ultimately agreed to guarantee freedom of religion for all while assuring that no national church, like the one in England, would ever be imposed on the people. Their compromise solution was embodied in the First Amendment, which has remained unchanged since first adopted.[134] As one commentator explained:

> The Free Exercise Clause was designed to work a dramatic change in the relationship between the church and the state. By it, the church would be freed from the power of the state. The Establishment Clause, in turn, would prevent the state from enforcing the rules of the church or from usurping her role in civil society.[135]

Despite the unchanged and relatively simple wording of the Free Exercise Clause, its meaning has been the subject of significant debate, particularly as our society has become increasingly pluralistic. Some scholars, as exemplified by Professor McConnell, have argued

131. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 (1991).

132. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437 (1990)(citations omitted).

133. DAVID BARTON, AMERICA'S GODLY HERITAGE 5 (Wall Builders 1993)(quoting STEVE C. DAWSON, GOD'S PROVIDENCE IN AMERICA'S HISTORY I:5 (1988)).

134. *See* McConnell, *supra* note 132, at 1473-85 (describing the development of the Free Exercise Clause).

135. Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT U. L. REV. 7, 62 (1995).

that the Free Exercise Clause was designed to protect religiously motivated conduct as well as freedom of belief.[136] The text of the amendment, however, does not explicitly protect rights of conscience.[137] Professor McConnell, nevertheless, bases his thesis in part on the fact that the terms "free exercise of religion" and "liberty of conscience" were used interchangeably by James Madison when explaining the meaning of the First Amendment.[138] Given his view that the Framers intended to protect rights of conscience, Professor McConnell argues that the Free Exercise Clause allows religious citizens exemptions from laws that would force them to violate their conscience.[139]

Other commentators have argued that the Framers did not intend the Free Exercise Clause to allow religious exemptions from neutral, generally applicable laws that inconvenience religiously motivated conduct.[140] For example, Herbert Titus advocates a jurisdictional approach to the First Amendment Religion Clauses that would allow for a robust church, freed from the tyranny of an over-reaching state.[141] Under his reading of the First Amendment's Religion Clauses, the Framers envisioned the church and the state operating within well-defined and mutually exclusive jurisdictions.[142] On the one hand, the state cannot regulate matters of religion, or "those matters that belong[ ] exclusively to God outside the jurisdiction of the State."[143] On the other hand, the state is free to require citizens to comply with all laws the state has the authority to enact, even if a particular citizen objects to a law on religious grounds.[144] The Supreme Court recently returned to an approach similar to Titus', after a relatively brief foray into Professor McConnell's approach.

The seminal free exercise decision was *Reynolds v. United States*,[145] in which the Court refused to exempt a Mormon from a law that proscribed polygamy.[146] Engaging in an historical analysis, the

136. *See* McConnell, *supra* note 132, at 1490.
137. *See id.*
138. *See id.* at 1494 (citing James Madison, *Report on the Virginia Resolutions* (Jan. 18, 1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 141 (Philip B. Kurland & Ralph Lerner eds., 1987)).
139. *See id.* at 1511-17.
140. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 326 (1991); Titus, *supra* note 135, at 10-13, 52-63. *Cf.* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992)(arguing that eighteenth-century Americans did not understand the Free Exercise Clause to provide individual exemptions).
141. *See* Titus, *supra* note 135, at 56-61.
142. *See id.* at 62.
143. *Id.* at 12.
144. *See id.* at 12-15, 52-63.
145. 98 U.S. 145 (1878).
146. *See id.* at 166-67.

Court determined that "religion" refers to the duty each individual owes to the Creator, and that the state has no authority to intrude on religious opinion or profession.[147] However, the state can regulate "overt acts against peace and good order."[148] Although the state could not require Mormons to believe in monogamy, it could determine that monogamy would "be the law of social life under its dominion."[149] Given that laws proscribing odious marital and sexual conduct were part of the common law tradition, the law criminalizing polygamy was a legitimate exercise of the police power.[150] The only remaining question was whether Reynolds was entitled to an exemption from the law based on a sincere religious objection.[151] The Court held that he was not:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.
>
> . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.
>
> . . . It matters not that his belief was a part of his professed religion: it was still belief, and belief only.
>
> . . . [I]t would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made.[152]

The Court essentially followed the *Reynolds* jurisdictional approach for eighty-five years and thus did not generally exempt religious objectors from valid laws.[153]

In 1963, the Court began a twenty-seven year experiment in granting exemptions to religious objectors. In *Sherbert v. Verner*,[154] a Seventh-Day Adventist refused to work on Saturday, which she considered the Sabbath.[155] The state refused to pay unemployment benefits to her because its unemployment laws only awarded benefits to persons who were involuntarily unemployed.[156] The state argued that its work requirement was necessary to protect against fraudulent claims.[157] Under the *Reynolds* jurisdictional approach, the Court should have ruled in favor of the state.[158] Instead, the Court estab-

147. *See id.* at 161-67.
148. *Id.* at 163.
149. *Id.* at 166.
150. *See id.*
151. *See id.*
152. *Id.* at 166-67.
153. *See generally* Titus, *supra* note 135, at 13-15 (summarizing the Court's free exercise jurisprudence through 1960).
154. 374 U.S. 398 (1963).
155. *See id.* at 399.
156. *See id.* at 401.
157. *See id.* at 407.
158. *See id.* at 418-23 (Harlan, J., dissenting).

lished a strict scrutiny test for cases involving legitimate regulations that inhibit religiously motivated conduct.[159] The Court held that the state did not meet its burden of satisfying the strict scrutiny test and thus had to grant Sherbert a religious exemption from its unemployment laws.[160]

In *Wisconsin v. Yoder*,[161] the Court made it clear that it had wholly abandoned the *Reynolds* jurisdictional approach in favor of a strict scrutiny test for all free exercise claims.[162] The Court granted an exemption to Amish parents from the state's compulsory school attendance law because the state was unable to show that the exemption would undermine the state's interest in compulsory education.[163] This opinion seemingly held great promise for future religious objectors, but beginning with *United States v. Lee*,[164] the Court dashed any hopes of wide-ranging exemptions. In *Lee*, a unanimous Court refused to exempt an Amish man from the obligation to pay social security taxes, holding that "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[165] Essentially, the Court held in *Lee* that the state met the strict scrutiny standard in defending the social security system from attack.[166] In the years following *Lee*, the Court consistently refused to grant religious exemptions to objectors,[167] with the exception of cases involving unemployment benefits, in which the Court simply followed *Sherbert*.[168]

In 1990, the Court abruptly and unexpectedly returned to the *Reynolds* jurisdictional approach. In *Employment Division v. Smith*,[169] two drug rehabilitation workers were fired from their jobs for using peyote during a Native American church ceremony. They filed for unemployment benefits, which the State of Oregon denied because the workers had been discharged for work-related misconduct.[170] The workers, relying on the *Sherbert* line of cases, claimed

159. *See id.* at 402-03.
160. *See id.* at 410.
161. 406 U.S. 205 (1972).
162. *See id.* at 215 ("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").
163. *See id.* at 215-36.
164. 455 U.S. 252 (1982).
165. *Id.* at 259.
166. *See id.* at 258-61.
167. *See* Titus, *supra* note 135, at 19-22.
168. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 832-35 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139-46 (1987); Thomas v. Review Bd., 450 U.S. 707, 713-20 (1981).
169. 494 U.S. 872 (1990).
170. *See id.* at 874.

that the denial was a violation of their free exercise rights.[171] The Court noted that *Sherbert* and the other employment benefit cases were not controlling because those cases did not involve denial of benefits due to illegal conduct.[172] Nevertheless, the Court did not rest its decision solely on that factual distinction. Rather, the Court completely reworked its free exercise jurisprudence by returning to a jurisdictional approach that generally does not allow exemptions for religious objectors.[173]

The Court specifically held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with 'a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[174] The Court thereby retreated to the humble beginnings of *Reynolds*. The state cannot interfere with the freedom to believe and profess whatever religious doctrine one desires, nor can it directly regulate physical acts of worship or proselytizing.[175] The state may, on the other hand, exercise its police power in a neutral, generally applicable way that incidentally restricts religiously motivated conduct. However, if the state adopts a regulation that is not neutral and generally applicable, the law will be subject to strict scrutiny review.[176]

Employment Division v. Smith was clearly contrary to the *Sherbert* approach whereby the Court applied strict scrutiny review regardless of whether the law was neutral or generally applicable. However, the Court explained in *Employment Division v. Smith* that it applied strict scrutiny review in the *Sherbert* line of cases, and in some other earlier

171. *See id.* at 876.

172. *See id.* at 885 ("We conclude today that the sounder approach . . . is to hold the [*Sherbert*] test inapplicable to such challenges.").

173. *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990).

174. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)(Stevens, J., concurring)). This portion of *Smith* is patently inconsistent with the following excerpt from *Yoder*:

> Nor can this case be disposed of on the grounds that [the state law] applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (citations omitted). Nonetheless, rather than taking the intellectually consistent approach of disavowing *Sherbert* and its progeny, including *Yoder*, the Court simply chose to limit those cases to their specific facts. *See* Employment Div. v. Smith, 494 U.S. 872, 881-84 (1990).

175. *See* Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

176. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-47 (1993). Laws are not neutral or generally applicable if they are not facially neutral, are facially neutral but were enacted to target a particular religion, or are biased against some, or all, religious beliefs. *See id.* at 532-33; *see also infra* notes 188-91 and accompanying text.

decisions, because those cases involved "hybrid" claims, where some other claim based on a constitutional protection or fundamental right was raised in addition to a free exercise claim.[177]

In direct response to *Employment Division v. Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA).[178] In RFRA, Congress specifically criticized *Employment Division v. Smith*,[179] and attempted to reinstate the strict scrutiny standard of *Sherbert* and its progeny.[180] Despite the wide-ranging coalition that backed RFRA, including a virtually unanimous Congress, the Court recently struck RFRA down as exceeding Congress' enforcement powers under section five of the Fourteenth Amendment.[181]

Under the controlling *Employment Division v. Smith* standard, a law that proscribes discrimination against unmarried couples in housing transactions, without providing more, would be neutral and generally applicable.[182] If the legislature did not enact the law to target religious belief, a religious landlord could not obtain an exemption from that law under the federal Free Exercise Clause.[183] However, some state laws are not neutral or generally applicable. Also, a state constitution may more vigorously protect free exercise rights than does the First Amendment.[184] Thus, the landlord may be able to obtain strict scrutiny review of the statute under these theories.

2. *Limited Exemptions Which Do Not Protect Religious Objectors*

In the several jurisdictions in which a statute prohibits landlords from discriminating on the basis of marital status, the legislature has provided limited exemptions from the fair housing law generally or specifically from the provision that proscribes marital status discrimination in housing. Although these exemptions vary somewhat, they typically give preferential treatment to certain religious organiza-

177. *See* Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990).
178. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).
179. *See id.* § 2000bb(a).
180. *See id.* § 2000bb(b).
181. *See* City of Boerne v. Flores, 521 U.S. 507 (1997)(holding that the Freedom Restoration Act exceeded Congress' §5 enforcement powers).
182. As will be discussed below, however, the court must strictly scrutinize a statute that additionally provides limited exemptions that do not include all religious objectors. *See infra* notes 185-224 and accompanying text.
183. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-47 (1993)(holding that a law that was generally applicable on its face but was enacted to target the practices of one religion was unconstitutional).
184. *See* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982)("[A] state court is entirely free to read its own state's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its [own] corresponding constitutional guarantee.").

tions,[185] and to landlords who live on the premises and/or do not rent multiple units.[186] These laws do not exempt other landlords who have equally genuine religious convictions against renting to unmarried couples. Even if a court is determined to protect unmarried couples by extending the marital status provision of the fair housing law beyond its plain meaning,[187] the court must strictly scrutinize the law because these limited exemptions violate both the neutrality/general applicability standard in *Employment Division v. Smith* and the Establishment Clause.

a. Free Exercise Clause—Neutrality / General Applicability

A statute that provides limited exemptions, particularly when it exempts some religious individuals or entities and not others, is not

185. *See* CAL. GOV'T CODE §12955.4 (West Supp. 1998)(religious organizations exempted); COLO. REV. STAT. §24-34-502(3) (West Supp. 1998) (religious organizations exempted); DEL. CODE ANN. tit. 6 §4607(a) (1993)(exemption for religious organizations); MD. ANN. CODE art. 49B, §21(d)(2)(e) (1994)(religious organizations exempted); N.H. REV. STAT. ANN. §354-A:13(c)II (1995)(religious organizations exempted); N.Y. EXEC. LAW §296(11) (McKinney 1998)(religious organizations exempted); R.I. GEN. LAWS §34-37-4.2 (Supp. 1997)(religious organizations exempted).

186. *See* HAW. REV. STAT. §515-4(a)(1)(2) (1993)(exemption for landlord who lives on the premises and rents one other unit and landlords who rent four rooms or less and reside on the premises); MD. ANN. CODE art. 49B §21(a)(2) (1994)(owner is exempt if rooms are rented in the owner's principal residence and the owner rents no more that five units); MICH. COMP. LAWS ANN. §37.2503(1)(a) (West 1996)(landlord is exempt for renting one additional unit in principal place of residence); MINN. STAT. ANN. §363.02 subd. 2(b) (West 1991)(exemption for rental by resident owner or occupier of a one-family accommodation); MONT. CODE ANN. §49-2-305(f)(2) (1997)(exemption for rental of sleeping rooms in private residence); N.H. REV. STAT. ANN. §354-A:13I(b)(c) (1995) (exemption for landlord who resides on the premises and rents accommodations for no more than three families or rents no more than five rooms); N.Y. EXEC. LAW §296(5)(a)(3) (McKinney Supp. 1998)(exemption for the rental of housing of two or less units where the landlord resides and for the rental of rooms in the landlord's residence); WASH. REV. CODE ANN. §49.60.222(2)(c) (West Supp. 1998)(exemption for landlord who rents three single houses or less and for landlords who rent four units or less within landlord's residence).

187. As was explained in section II *supra,* no current state fair housing law can properly be construed to force landlords to rent to unmarried cohabitants. Nevertheless, courts in four states have construed provisions proscribing marital status discrimination to forbid landlords from excluding unmarried couples. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282-83 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996)(plurality opinion); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723, 726, 728 (Mich. 1998). The discussion in this subsection is accordingly limited to jurisdictions which have statutes proscribing marital status discrimination. If, in the future, a state legislature adopts a statute that explicitly protects unmarried cohabitants but only provides limited exemptions, that law should be subjected to strict scrutiny review as well.

neutral or generally applicable.[188] "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs . . . ."[189] A law that exempts some organized religious institutions, but not other religious institutions or individuals, discriminates on the basis of religion. For the legislature to maintain religious neutrality, it must either provide no religious exemptions or open-ended religious exemptions. Otherwise, the state impermissibly favors some religious beliefs over others.[190] Fair housing laws that exempt some, but not all, religiously motivated landlords are neither neutral nor generally applicable and accordingly must be subjected to strict scrutiny review.[191]

b. Establishment Clause

Similarly, a statute that grants a preference to one class of religious beliefs or groups, but denies that preference to others, is also subject to strict scrutiny under the Establishment Clause. In *Larson v. Valente*,[192] the Supreme Court considered an Establishment Clause challenge to a statute governing reporting requirements for charitable organizations.[193] This statute initially included an exemption for all churches, but the legislature later amended it to exempt only those churches receiving more than fifty percent of their contributions from members or affiliated organizations.[194] The legislative history demonstrated explicit legislative intent to include particular religious denominations and to exclude others.[195] The Court held that where a state law distinguishes between religious beliefs, the state must show that the law serves a compelling state interest and is narrowly drawn to achieve that end.[196] In religious exemption cases, there must be a close fit between the preference and the interest.[197]

188. Neutrality and general applicability are not wholly distinct standards. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

189. Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); *see also* Employment Div. v. Smith, 494 U.S. 872, 884 (1990)("[W]here the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

190. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993).

191. *See id.* at 533, 546.

192. 456 U.S. 228 (1982).

193. *See id.* at 230.

194. *See id.* at 230-32.

195. *See id.* at 254.

196. *See id.* at 246 ("[W]hen we are presented with a state law granting denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.").

197. *See id.* at 246-47. *Cf.* Sherbert v. Verner, 374 U.S. 398, 406 (1963)("The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the

Although *Larson* involved explicit legislative intent to discriminate among religious beliefs, the Supreme Court subsequently ordered that the *Larson* strict scrutiny analysis must also be applied when legislative intent is benign.[198] In *Grant v. Washington Public Employment Relations Commission*,[199] the Court vacated a Washington Supreme Court decision that upheld the constitutionality of a statutory exemption scheme similar to those in several state fair housing laws.[200] The Washington statute permitted individuals belonging to an established religious institution to opt out of paying union dues but denied the exemption to other persons who had religious objections to union membership but did not belong to an established religious group.[201] The Supreme Court ordered the Washington Supreme Court to reconsider its decision in light of *Larson*.[202]

Two federal courts have applied *Larson* and *Grant* in contexts similar to the one at issue in this Article. In *Wilson v. NLRB*,[203] the court held that the religious objector exemption of the National Labor Relations Act (NLRA) violated the federal Establishment Clause because it preferred some forms of religious belief over others.[204] The court stated that section 19 of the NLRA facially discriminated among religions because it exempted from union membership only those employees who were members of "bona fide" religious organizations with tenets opposed to union membership.[205] Individuals who did not belong to such organizations were not exempt even though their religious convictions against union membership were also sincere.[206] The court ruled that section 19 created an impermissible "preference by conferring a benefit on members of the religious organizations described in the statute."[207] The court dismissed the NLRB's contention that section 19 served a compelling state interest.[208] The Board had

religious discrimination which South Carolina's general statutory scheme necessarily effects.").

198. *See* Grant v. Washington Pub. Employment Relations Comm'n, 456 U.S. 955 (1982).

199. 456 U.S. 955 (1982).

200. *See id., vacating and remanding* Grant v. Washington Pub. Employment Relations Comm'n, 635 P.2d 1071 (Wash. 1981).

201. *See* Grant v. Spellman, 664 P.2d 1227, 1229 (Wash. 1983).

202. *See* Grant v. Washington Pub. Employment Relations Comm'n, 456 U.S. 955 (1982). On remand, the Washington Supreme Court found a way to interpret the statutory language so as to include religiously motivated objectors who did not belong to an established religious group. *See* Grant v. Spellman, 664 P.2d 1227, 1230 (Wash. 1983).

203. 920 F.2d 1282 (6th Cir. 1990).

204. *See id.* at 1290. The National Labor Relations Act is found at 29 U.S.C. § 169 (1994).

205. *See* Wilson v. NLRB, 920 F.2d 1282, 1287 (6th Cir. 1990).

206. See *id.*

207. *Id.*

208. *See id.*

asserted that Congress drew the exemption as it did so that the "'difficult and troublesome' . . . inquiries concerning the religious nature of an objector's beliefs" could be directed to the federal courts where they could be properly resolved.[209] The Sixth Circuit ruled that the Board's explanation was insufficient to meet its burden under strict scrutiny analysis.[210]

Similarly, in *Children's Healthcare is a Legal Duty, Inc. v. Vladeck*,[211] the court considered an establishment clause challenge to certain exemptions for Christian Science sanitoria from Medicare and Medicaid regulatory standards.[212] Noting that the exemption favored only one religious belief, the court held that the provision must be strictly scrutinized.[213] Although the exemption furthered a compelling state interest, it was not narrowly tailored to that interest because it was under-inclusive.[214] Other religious groups could conceivably have qualified for the exemption under the rationale given for its enactment and yet only Christian Scientists were exempted.[215] The *Vladeck* court also observed that the enactment of the exemption in an effort to accommodate the free exercise of religious belief did not save it from constitutional defect.[216] The court opined that "even the most honorable of intentions cannot cure the constitutional defect. The general interest of religious accommodation is consistent with the values supporting the First Amendment; this particular manner of accommodation is not."[217]

There are a few cases addressing the constitutionality of a religious exemption to the Social Security Act that are inconsistent with *Larson* and *Grant*.[218] The Social Security Act exemption permits religious self-employed individuals to avoid paying social security taxes if they are members of a recognized religious sect which adheres to established teachings against any system of government-sponsored welfare payments, provided that the religious sect makes sufficient provision for its dependent members.[219] Some courts have rejected claims that the group membership requirement for a religious exemption violated

209. *See id.*
210. *See id.*
211. 938 F. Supp. 1466 (D. Minn. 1996).
212. *See id.* at 1468.
213. *See id.* at 1473-74.
214. *See id.* at 1479-81.
215. *See id.* at 1474.
216. *See id.* at 1480.
217. *Id.*
218. *See* Droz v. Commissioner, 48 F.3d 1120 (9th Cir. 1995); Bethel Baptist Church v. United States, 822 F.2d 1334 (3d Cir. 1987); Jaggard v. Commissioner, 582 F.2d 1189 (8th Cir. 1978). *Cf.* United States v. Lee, 455 U.S. 252, 260-61 (1982)(referring to exemptions to the Social Security law, but not in the context of an establishment clause challenge).
219. *See* 26 U.S.C. § 1402(g) (1994).

the Establishment Clause by discriminating among various religious beliefs.[220]

These cases are questionable because they contradict the Supreme Court's view that exemptions which favor some religious beliefs over others are facially discriminatory.[221] Had these courts followed *Grant* and *Larson,* they would have held that the facially discriminatory exemptions triggered strict scrutiny review. Perhaps these courts could have legitimately upheld the exemption scheme in the Social Security Act given the compelling governmental interest in providing a financial safety net for the nation's elderly and infirm.[222] However, as will be explained in Part V below, the government has no such compelling interest in forcing religious objectors to rent to unmarried couples.[223]

When a state exempts only some religious organizations or landlords from its fair housing law, the state improperly exalts their religious beliefs over the beliefs of others. Under *Larson* and *Grant*, these exemptions are facially discriminatory and must be subjected to strict scrutiny review.[224]

B. Alternative Federal Constitutional Claims

In *Employment Division v. Smith*, the Court suggested that strict scrutiny review may apply in cases presenting a "hybrid" claim, where the free exercise claim is coupled with some other constitutional claim.[225] No Supreme Court case since *Employment Division v. Smith* has involved a hybrid claim, although a few federal courts have interpreted the Court's "hybrid" language to justify strict scrutiny review

220. *See* cases cited in *supra* note 218.

221. *See* Grant v. Washington Pub. Employment Relations Comm'n, 456 U.S. 955 (1982); Larson v. Valente, 456 U.S. 228, 252-54 (1982). Indeed, one court did not even acknowledge *Grant or Larson*. *See* Bethel Baptist Church v. United States, 822 F.2d 1334, 1342 (3d Cir. 1987).

222. *See, e.g.*, United States v. Lee, 458 U.S. 252, 258-61 (1982) (refusing to grant a religious exemption to the duty to pay Social Security taxes due to the importance of the Social Security system).

223. *See supra* Part V.

224. It ultimately makes no difference whether the court subjects the exemptions alone, or the provision requiring landlords to rent to unmarried couples, to strict scrutiny review. To evaluate the constitutionality of the exemptions, the court must analyze the purpose of the provision that protects unmarried couples to determine whether the exemptions are sufficiently, narrowly drawn to achieve the statute's purpose. *See* Larson v. Valente, 456 U.S. 228, 246-47 (1982). The state could cure its violation of the Establishment Clause and the free exercise neutrality/general applicability standard in two ways. First, it could exempt all, not just some, religious objectors. This approach would resolve the dispute that is the subject of this Article. Second, it could eliminate all exemptions. This approach would resolve the Establishment Clause and neutrality/general applicability issues. As sections IV.B and IV.C *infra* explain, however, the landlord may have other avenues to strict scrutiny review.

225. *See* Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990).

under the free exercise clause.[226] The ambiguity of the hybrid language in *Employment Division v. Smith* has generated a significant debate. Under one view, this hybrid theory suggests a reinvigoration of the *Sherbert* free exercise analysis in cases where a free exercise claim is coupled with some other important claim.[227] The fact that the Court cited *Yoder* as an example of a hybrid claim and never explicitly repudiated *Sherbert* and its progeny[228] lends some support to this view. Under the contrary view, the Court's hybrid language simply reflects that strict scrutiny review was applied in earlier decisions *only* because of the other fundamental claim raised, and *not* under the Free Exercise Clause.[229]

The Court's hybrid language may have been a futile attempt to reconcile the irreconcilable differences between *Employment Division v. Smith* and the *Sherbert* line of cases. Justice Souter summed this point up well in his concurring opinion in *City of Hialeah*:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[230]

Regardless of whether the hybrid theory is a viable means of obtaining strict scrutiny review under the Free Exercise Clause, there are two other federal constitutional claims that may be relevant to disputes between landlords and excluded unmarried couples.

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226. *See, e.g.*, Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995)(acknowledging the hybrid theory but holding that it had not been shown); American Friends Serv. Comm. Corp. v. Thornburgh, 941 F.2d 808, 810-11 (9th Cir. 1991)(hybrid theory not met in instant case).

227. *See* Stein, *supra* note 6, at 172-79 (describing the "additive" and "signaling" theories postulated in support of hybrid claims); Gary Stuart McCaleb, Comment, *A Century of Free Exercise Jurisprudence: Don't Practice What You Preach*, 9 REGENT U. L. REV. 253, 272-74 (1997)(describing the view that the Court's hybrid theory suggests a reinvigoration of the *Sherbert* free exercise analysis).

228. *See* Employment Div. v. Smith, 494 U.S. 872, 881, 883-84 (1990).

229. *See* James R. Mason, III, Comment, *Smith's Free Exercise "Hybrids" Rooted in Non-Free Exercise Soil*, 6 REGENT U. L. REV. 201, 254-57 (1995)(explaining at length why it is highly unlikely that the Court intended the hybrid language in *Employment Division v. Smith* to create a new method of obtaining strict scrutiny review under the Free Exercise Clause).

230. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993)(Souter, J., concurring).

1. Free Speech

Although the landlord's free speech rights are not usually implicated in the typical dispute with spurned unmarried cohabitants, in two cases the government clearly infringed the landlord's free speech rights.

In *Smith v. Fair Employment & Housing Commission*,[231] a landlord objected on religious grounds to renting to an unmarried couple.[232] The couple filed a complaint with the California Fair Employment and Housing Commission, and the commission subsequently entered a cease and desist order and imposed civil penalties on the landlord.[233] The commission further required the landlord to post and distribute to prospective tenants provisions of the state fair housing law and notice of the landlord's previous violation and current full compliance with the law.[234] When the landlord challenged this notice requirement on appeal, the commission offered to remove it.[235]

The commission was wise to make this offer. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,[236] a group of gays, lesbians, and bisexuals sued the organizers of a parade for allegedly violating the Massachusetts public accommodation law by not allowing the group to participate in the parade.[237] Because the organizers objected to the message that the group would convey by participating, they argued that the state would violate the organizers' free speech rights if it forced them to include the group in the parade.[238] In holding for the organizers, a unanimous Supreme Court stated:

> Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say. Although the State may at times prescribe what shall be orthodox in commercial advertising by requiring dissemination of purely factual and uncontroversial information, outside that context it may not compel affirmance of a belief with which the speaker disagrees. Indeed, this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . . Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.[239]

231. 913 P.2d 909 (Cal. 1996)(plurality opinion).
232. *See id.* at 912.
233. *See id.* at 914.
234. *See id.*
235. *See id.* at 921 n.15.
236. 515 U.S. 557 (1995).
237. *See id.* at 560-61.
238. *See id.* at 566.
239. *Id.* at 573-74 (citations and internal quotation marks omitted); *see also* Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 9 (1985)(holding that state

Similarly, in *Thomas v. Anchorage Equal Rights Commission*,[240] two Christian landlords objected to state and local laws that required them to forego expressing their religious objections to renting to unmarried cohabitants.[241] The Ninth Circuit held that the state and local laws proscribed religious speech, which enjoys plenary First Amendment protection.[242]

Because the state's burden when defending against a free speech claim is essentially the same as under a free exercise claim,[243] this alternative theory may provide a landlord another means to obtain strict scrutiny review. As the commission's reaction in *Smith v. Fair Employment & Housing Commission* suggests, a knowledgeable state commission will not likely impose such a notice requirement and thereby risk facing a free speech claim that could give rise to a hybrid argument under the free exercise clause. States can certainly ensure compliance with their fair housing laws without this notice requirement. If state actors nevertheless insist on restricting the speech rights of religious landlords, the landlords will have viable free speech claims.

2. *Takings*

One commentator has argued that the "right to exclude" described in the Court's takings cases may be combined with a free exercise argument to present a hybrid claim on behalf of religious landlords.[244] Although the California court provided little detail in its dismissal of the landlord's claim,[245] this hybrid argument was apparently made in *Smith v. Fair Employment & Housing Commission*. This argument is both internally consistent and in accord with general concepts of property law, but a unanimous Supreme Court recently eviscerated it.[246]

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utilities commission could not force utility to mail out a third party's newsletter, noting that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set"); Wooley v. Maynard, 430 U.S. 705 (1977) (holding that the state violated objecting citizens' free speech rights by forcing them to display the state's motto on their license plates).

240. Nos. 97-35220 & 97-35221, 1999 WL 11337 (9th Cir. Jan. 14, 1999).

241. *See id.* at *8.

242. *See id.* at *18 (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993))

243. *See, e.g.*, International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)(restrictions on speech will survive only if they are narrowly drawn to achieve a compelling state interest).

244. *See* Stein, *supra* note 6, at 169-72, 180-95 (citing Dolan v. City of Tigard, 512 U.S. 374 (1994); Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

245. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P. 2d 909, 921 & n.15 (Cal. 1996)(plurality opinion).

246. *See* Yee v. City of Escondido, 503 U.S. 519 (1992).

In *Yee v. City of Escondido*,[247] the Court held that a rent control ordinance that required mobile home park owners to continue to rent to certain tenants did not effect a *per se* taking.[248] The Court noted that the landlords had willingly entered the market and thus were not being forced to rent.[249] Rather, the law merely required the landlords to rent to certain specified tenants.[250] The Court explicitly rejected the landlords' argument that the law infringed on the right to exclude and therefore constituted a taking.[251]

Yee can be criticized for the Court's failure to appreciate basic principles of landlord and tenant law. The Court based its decision on a case involving a motel.[252] A transaction to stay in a motel, however, involves a mere license which is not a property interest.[253] By contrast, a lease involves the creation and conveyance of a non-freehold estate, a property interest which gives the tenant the right to exclusive possession.[254] A landlord gives up the right to possess his property while a motel owner can recover possession at any time.[255] Thus, a landlord's property rights are more greatly infringed when he is forced to rent than are a motel owner's rights when he is forced to open a room to someone.

If the hybrid language in *Employment Division v. Smith* does create a distinct theory to achieve strict scrutiny review under the Free Exercise Clause, then the Court's questionable decision in *Yee* eliminates one important claim for landlords. If there is no distinct hybrid theory, however, *Yee* does not greatly affect these landlords because a takings claim alone would not achieve their ultimate goal. The remedy for a taking is "just compensation."[256] Religious landlords do not want just compensation for lost property rights; they want protection of religious liberty and of the right not to rent to unmarried couples. Thus, the impact of *Yee* ultimately depends on whether there is a hybrid theory to support strict scrutiny review under the Free Exercise Clause.[257]

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247. *Id.*
248. *See id.* at 539.
249. *See id.* at 527.
250. *See id.* at 528-29.
251. *See id.* at 532.
252. *See id.* at 529, 531 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)).
253. CUNNINGHAM ET AL., *supra* note 19, §6.2, at 250-51, §6.6, at 254.
254. *See supra* note 19 and accompanying text.
255. CUNNINGHAM ET AL., *supra* note 19, §6.2, at 250-51, §6.6, at 254.
256. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 842 (1987).
257. In *Thomas v. Anchorage Equal Rights Comm'n*, the Ninth Circuit held that Alaska state and local laws that required landlords to rent to unmarried couples constituted a regulatory taking that supported a hybrid free exercise claim. *See* Nos. 97-35200 & 97-35221, 1999 WL 11337, at *13-15 (9th Cir. Jan. 14, 1999). While the court's analysis in *Thomas* is sound in several respects (*see, e.g.*, sec-

C. State Free Exercise Claims

A state constitution may protect free exercise rights more vigorously than the First Amendment does.[258] In the aftermath of *Employment Division v. Smith*, several commentators urged state courts to give heightened, independent attention to their state's free exercise clause as an alternative means of attaining strict scrutiny review in cases involving religious objectors.[259] A state free exercise claim is potentially valuable to a religious landlord because it offers the hope of an exemption from the law, which is the landlord's ultimate goal. Because the states' free exercise clauses vary widely,[260] some state constitutions may support exemptions to state fair housing laws while others may not.

A state court should not summarily reject *Employment Division v. Smith* and declare that the *Sherbert/Yoder* strict scrutiny approach is the law of the state. The proper role of the court is to ascertain the

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tion IV.B.1 *supra* and section IV.C.2 and Part V *infra*), the court's takings analysis is curious at best. The Supreme Court has clearly rejected the notion that laws requiring landlords to rent to certain classes of tenants impermissibly infringe the landlords' right to exclude. *See* Yee v. City of Escondido, 503 U.S. 519, 532 (1992). To effect a regulatory taking, a law must so regulate the property that it "goes too far" in infringing the owner's proeprty rights. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). State fair housing laws like those in Alaska do not physically intrude on the landlord's property but simply require that, once the landlord decides to rent premises, he may not exclude certain classes of people. Moreover, according to *Yee*, these laws do not take away any part of the landlord's bundle of rights. If these laws take away no property right, then by definition they do not go too far in infringing the landlord's property rights. Finally, these laws enlarge the landlord's pool of prospective tenants and thus, if anything, make his property potentially more valuable. For these reasons, as long as the Supreme Court adheres to its analysis in *Yee*, the holding in *Thomas* on the takings issue is questionable and thus is unlikely to be widely accepted. As explained above, in *Yee*, the Supreme Court misapplied basic principles of property law. *See supra* notes 247-56 and accompanying text. Had the Court correctly understood the distinction between a leasehold and an agreement to allow a guest to stay in a motel, it would have held that laws requiring landlords to rent to certain classes of tenants infringe the landlords' right to exclude.

258. *See* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982)("[A] state court is free to read its own constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its own corresponding constitutional guarantee.").

259. *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. REV. 275 (1993); Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017 (1994); Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49 (1992); Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747 (1993).

260. *See generally* Carmella, *supra* note 259, at 293-305, 321 (describing various religious liberty clauses of state constitutions).

original meaning of the state's religion clause based on the distinctive wording, origins and character of the state constitution.[261] In some states, the religious liberty clause mirrors the First Amendment.[262] In those jurisdictions, if the state court is persuaded that *Employment Division v. Smith* was correctly decided, as some commentators believe,[263] and if the state constitution was deliberately patterned after the First Amendment, then state law may protect religious liberty in the same manner as *Employment Division v. Smith*.[264]

The text of a state constitutional provision may suggest the intent to protect more religiously motivated conduct than *Employment Division v. Smith's* narrow protection of worship and related activities.[265] For example, many state constitutions broadly insulate the rights of conscience from state intrusion.[266] Others refer more generally to the liberty, or rights, of conscience secured by the state constitution.[267] This protection of rights of conscience may suggest that the state cannot enforce a law in a way that would require a citizen to violate his conscience. The history of the drafting of the free exercise clause may

261. *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 855-61 (1991) (advocating an interpretive approach of ascertaining original intent based on the context and character of the state constitution).

262. *See* ALASKA CONST. art. I, § 4; FLA. CONST. art. I, § 3; HAW. CONST. art. I, § 4; IOWA CONST. art. I, § 3; LA. CONST. art. I, § 8; MASS. CONST. art. 46, § 1; MONT. CONST. art. II, § 5; S.C. CONST. art. I, § 2. *Cf.* VA. CONST. art. I, § 16 ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience.").

263. *See, e.g.*, Marshall, *supra* note 140, at 326; Titus, *supra* note 135, at 10-13, 52-63. *But see* McConnell, *supra* note 132, at 1511-17 (arguing that the Framers intended the free exercise clause generally to allow for exemptions from laws requiring religious objectors to violate their conscience).

264. *Cf.* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska 1994)(distinguishing *Employment Division v. Smith* and applying the *Sherbert* standard without explaining why the Alaska constitution should be construed differently than the identical language of the First Amendment to the United States Constitution); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994)(interpreting state constitution under *Sherbert* standard).

265. *See* Employment Div. v. Smith, 494 U.S. 872, 877-78 (1990) (noting that the state may not regulate conduct simply because it is motivated by religious belief).

266. *See* ARK. CONST. art. II, § 24; CONN. CONST. art. VII; DEL. CONST. art. I, § 1; IND. CONST. art. I, §§ 2,3; KAN. CONST. B. of R. § 7; KY. CONST. § 5; ME. CONST. art. I, § 3; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MO. CONST. art. I, § 5; NEB. CONST. art. I, § 4; N.H. CONST. pt.1, art. 5; N.J. CONST. art. I, § 3; N.M. CONST. art. II, § 11; N.C. CONST. art. I, § 13; OHIO CONST. art. I, § 7; OR. CONST. art. I, §§ 2, 3; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 3; UTAH CONST. art. 1, § 4; VT. CONST. ch. I, art. 3; WASH. CONST. art. I, § 11; WIS. CONST. art. I, § 18.

267. *See* ARIZ. CONST. art. II, § 12; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; MISS. CONST. art. III, § 18; NEV. CONST. art. I, § 4; N.Y. CONST. art. I, § 3; N.D. CONST. art. I, § 3; WYO. CONST. art. I, § 18.

support the view that this protection of conscience exceeds the protection guaranteed by the Free Exercise Clause of the First Amendment.[268] Although early drafts of the Free Exercise Clause included explicit protection of the rights of conscience, the Framers deleted this provision from the final text.[269] The framers of state constitutions therefore may have inserted a clause explicitly protecting the rights of conscience to provide protection they knew the Federal Free Exercise Clause did not give.[270] Similarly, other state constitutions protect citizens from being "molested" in person or property because of religious beliefs or opinions.[271] This language likewise may protect religiously motivated conduct, including that of religious landlords whose property rights are clearly affected in these cases. Several state courts have held that *Employment Division v. Smith* is inconsistent with their state constitution and thus have applied a strict scrutiny analysis to determine if religious objectors are entitled to an exemption from an otherwise valid law.[272]

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268. *See* Titus, *supra* note 135, at 52-56 (explaining how a phrase protecting the "rights of conscience" was removed from earlier drafts of the First Amendment, and how the revisions to the text reflect that the Free Exercise Clause does not generally protect individual conscience). *But see* McConnell, *supra* note 132, at 1488-1500 (arguing that the Free Exercise Clause protects individual conscience despite the deletion of explicit protection of the rights of conscience from the text).

269. *See* Titus, *supra* note 135, at 53.

270. *See* State v. Hershberger, 462 N.W.2d 393, 397-98 (Minn. 1990) (stating that the state constitutional protection of conscience provides more protection than the federal Free Exercise Clause); First Covenant Church v. City of Seattle, 840 P.2d 174, 185-87 (Wash. 1992)(state constitution provides more protection than Federal Free Exercise Clause); State v. Miller, 549 N.W.2d 235, 238-40 (Wis. 1996)(state constitution provides more protection than Federal Free Exercise Clause). *But see* State v. Loudon, 857 S.W.2d 878, 882-83 (Tenn. Crim. App. 1993)(holding that the state constitutional protection of conscience did not relieve an objector from complying with a neutral, generally applicable law).

271. *See* GA. CONST. art. I, § I para. IV; MD. CONST. art. 36; MASS. CONST. art. II; OKLA. CONST. art. I, § 2; W. VA. CONST. art. III, § 15.

272. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-82 (Alaska 1994); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 38-41 (Ct. App. 1991), *review granted*, 825 P.2d 766 (Cal. 1992), *review dismissed*, 859 P.2d 671 (Cal. 1993)(not published in official reporter and cannot be cited in California); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994); State v. Hershberger, 462 N.W.2d 393, 397-98 (Minn. 1990); State v. French, 460 N.W.2d 2, 8-9 (Minn. 1990); First Covenant Church v. City of Seattle, 840 P.2d 174, 185-87 (Wash. 1992); Wisconsin v. Miller, 549 N.W.2d 235, 238-40 (Wis. 1996). *Cf.* Rupert v. City of Portland, 605 A.2d 63, 65-66 (Me. 1992)(explaining that strict scrutiny review applies when a person challenges a governmental regulation as a violation of the Free Exercise Clause of the Maine Constitution); Porth v. Roman Catholic Diocese, 532 N.W.2d 195, 198-99 (Mich. Ct. App. 1995)(deferring consideration of whether the state free exercise clause provides more protection than the federal Free Exercise Clause); Hunt v. Hunt, 648 A.2d 843, 852-53 (Vt. 1994)(explaining that free exercise claims under the Vermont Constitution are subject to strict scrutiny review). Although the wording of the

If a state free exercise claim is a viable option, the landlord must prove that he holds a sincere religious belief, as opposed to a mere personal opinion or conviction, which the law substantially burdens.[273]

1. Sincerely Held Religious Belief

It will not be difficult for a landlord to prove that he has a sincerely held religious belief that compels him to exclude unmarried couples. This burden is imposed only to insure that an objector honestly bases his objection on principles of faith and not on personal preferences or secular ideologies:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.[274]

In employing this test, the court may make sure that the belief is in fact grounded in a particular religious belief.[275] However, the court may not speculate as to the truth of the belief or question whether the majority of the proponents of the faith at issue adhere to that belief.[276]

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state constitution may require a unique test, in cases where a state court has determined that its constitution explicitly protects conscience-based conduct, the courts have applied the *Sherbert/Yoder* strict scrutiny analysis or some close variation of it. *See Swanner*, 874 P.2d at 281-82; *Donahue*, 2 Cal. Rptr. 2d at 38-41; *Desilets*, 636 N.E.2d at 235-36; *Hershberger*, 462 N.W.2d at 397-98; *French*, 460 N.W.2d at 8-9; *First Covenant Church*, 840 P.2d at 185-87; *Miller*, 549 N.W.2d at 238-40. *Cf.* McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998)(applying the *Sherbert/Yoder* strict scrutiny analysis under the Michigan constitution but not explaining why the court did so). Thus, the analysis in Part V, *infra*, presumes that the *Sherbert/Yoder* compelling state interest standard will govern any strict scrutiny analysis under a state free exercise claim. This analysis should also be relevant to any unique test that may apply.

273. *See* Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972); Sherbert v. Verner, 374 U.S. 398, 403-04 (1963). If the landlord meets this burden, then the burden shifts to the state to prove that the law furthers a compelling governmental interest and is the least restrictive means of furthering that interest. The landlord's burden is unique to a free exercise claim. *See Yoder*, 406 U.S. at 214-25; *Sherbert*, 374 U.S. at 403, 407-09. The state's burden is discussed in Part V, *infra*.

274. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)(footnote omitted).

275. *See id.* at 216 ("[W]e see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction . . . .").

276. *See* Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981); *see also* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 923 (Cal. 1996)(plurality opinion)(holding that the landlord's religious belief was sincere even though the hierarchy of a particular denomination allegedly did not agree with it).

In the reported cases to date, the landlords who would not rent to unmarried couples for religious reasons have been devout Christians, some Protestant, others Roman Catholic.[277] Although no court has questioned the sincerity of the landlord's religious beliefs,[278] some commentators have characterized the beliefs as extreme or unusual.[279] To the contrary, the belief that fornication is wrong is firmly supported by Scriptural texts and by the Catechism of the Catholic Church.

The Old Testament teaches that, in the nation of Israel, adultery and sodomy were punishable by death.[280] Fortunately for fornicators, they were treated more leniently. If a man and woman had intercourse outside of marriage, the man had to pay a bride price to the woman's father, who would then decide if the couple must marry.[281] The principle that sexual intercourse may properly occur only within marriage is also reflected in a traditional Orthodox blessing for a Jewish betrothal:

> Blessed art thou, Lord our God, King of the universe, who hast sanctified us with thy commandments, and prohibited illicit relations; thou hast forbidden the cohabitation of those who are merely betrothed, permitting it to those who are married through consecrated wedlock. Blessed art thou, O Lord, who sanctifiest thy people Israel by consecrated wedlock.[282]

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277. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *1 (9th Cir. Jan. 14, 1999)(Christian); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276-77 (Alaska 1994)(Christian); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 912 (Cal. 1996)(plurality opinion) (Presbyterian); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 n.1 (Ct. App. 1991)(Roman Catholic), *review granted*, 825 P.2d 766 (Cal. 1992), *review dismissed*, 859 P.2d 671 (Cal. 1993)(not published in official reporter and cannot be cited in California); Jasniowski v. Rushing, 678 N.E.2d 743, 745 (Ill. App. Ct. 1997)(no denominational affiliation identified but objection based on the Bible), *vacated*, 685 N.E.2d 622 (Ill. 1997); Attorney Gen. v. Desilets, 636 N.E.2d 233, 234 (Mass. 1994)(Roman Catholic); State v. French, 460 N.W.2d 2, 3-4 (Minn. 1990)(Evangelical Free). *Cf.* McCready v. Hoffius, 586 N.W.2d. 723, 725 (Mich. 1998)(no denominational affiliation or source of religious beliefs described).

278. Even the Supreme Court of Alaska, which otherwise strained to rule against the religious landlord in *Swanner*, held that the landlord met the threshold requirement of establishing that a sincere religious belief prompted his conduct. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281-82 (Alaska 1994).

279. *See, e.g.*, Markey, *The Price*, *supra* note 6, at 702, 752, 822 (referring to the belief that fornication is immoral as "religious zealotry," "atavistic" and "arbitrary").

280. *See Leviticus* 20:10, 13.

281. *See Exodus* 22:16-17; *Deuteronomy* 22:28-29. *See generally* Roger Bern, *A Biblical Model for Analysis of Issues of Law and Public Policy*, 6 REGENT L. REV. 103, 185-86 (1995).

282. PHILIP BIRNBAUM, A BOOK OF JEWISH CONCEPTS 424 (1964).

The New Testament likewise prohibits sexual relations outside of marriage. The Scriptures refer to fornication[283] as behavior that defiles the participant,[284] separates one from God,[285] flows from a depraved mind,[286] and deserves judgment.[287] Saint Paul contrasted various sins, or "works of the flesh," including fornication, with the "fruit of the Spirit," which includes such things as love, joy and peace.[288] He specifically instructed and exhorted Christians not to engage in sexual relations outside of marriage.[289]

The Catechism of the Catholic Church reinforces these Scriptural teachings. It explains that all people who are baptized are called to lead a chaste life in accordance with their particular stage of life.[290] Such chastity includes abstaining from all sexual conduct outside of marriage.[291] The Catechism makes it plain that one cooperates in the sins of others by either not exercising one's authority to hinder those sins or by protecting those who engage in sin.[292] It also directly proscribes fornication and unmarried cohabitation:

> *Fornication* is carnal union between an unmarried man and an unmarried woman. It is gravely contrary to the dignity of persons and of human sexuality which is naturally ordered to the good of spouses and the generation and education of children.
>
> . . . .
>
> In a so-called *free union*, a man and a woman refuse to give juridical and public form to a liaison involving sexual intimacy . . . . [A free union] offend[s] against the dignity of marriage; [it] destroy[s] the very idea of family; [it] weaken[s] the sense of fidelity. [It is] contrary to the moral law. The sexual act must take place exclusively within marriage. Outside of marriage it al-

283. Although "fornication" is used in the King James Version of the New Testament, it is not used in all translations. For example, the New International Version uses the phrase "sexual immorality." However, the operative Greek word is *porneia*, which literally means harlotry, idolatry, and fornication. *See* JAMES STRONG, *Greek Dictionary of the New Testament*, *in* THE EXHAUSTIVE CONCORDANCE OF THE BIBLE para. 4202, at 59 (Abingdon-Cokesbury Press 1953)(1894). "Fornication" is "sexual intercourse between a man and woman not married to each other." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 499 (1984).

284. *See Matthew* 15:18-20.

285. *See* 1 *Corinthians* 6:9-7:5; *Colossians* 3:5-7.

286. *See Romans* 1:18-32.

287. *See id.*

288. *See Galatians* 5:19-25; *see also* CATECHISM OF THE CATHOLIC CHURCH para. 1852, at 454 (Liguori Publications 1994)[hereinafter CATECHISM].

289. *See* 1 *Corinthians* 10:8-13; 1 *Thessalonians* 4:3-8.

290. *See* CATECHISM, *supra* note 288, para. 2348, at 564.

291. *See id.* para. 2352, at 564.

292. *See id.* para. 1868, at 457. This principle is consistent with the scriptural exhortation to hate evil and to have nothing to do with it. *See Psalm* 101:4; *Proverbs* 8:13. Thus, one commentator is mistaken when she asserts that "a prohibition on the facilitation of the assumed sexual acts of third parties is undoubtedly not a central tenet of [Christian] religions." *See* Markey, *The Price*, *supra* note 6, at 819.

> ways constitutes a grave sin and excludes one from sacramental communion.[293]

The religious beliefs of the landlords who in reported decisions have not rented to unmarried cohabitants are clearly rooted in historic Judeo-Christian teachings.[294] If an individual landlord sincerely believes in these teachings, or in similar principles of another faith, the landlord will easily meet the burden of proving that the decision not to rent to the couple was based on a sincere religious belief.

2. *Substantial Burden*

Once the landlord demonstrates the sincerity of his religious belief, he must next show that forcing him to rent to unmarried cohabitants will substantially burden his free exercise rights.[295] As with the sincerity test, a religious landlord should not have a difficult time meeting this burden of proof. Generally, the landlord need only show that the law favoring unmarried cohabitants forces him to either violate deeply held convictions against facilitating immorality or to abandon the source of income derived from his rental properties, in some cases his sole livelihood.[296]

The Supreme Court and commentators have made it clear that this substantial burden test is not difficult to meet. Professor Laurence Tribe has equated the substantial burden test with a mere showing that there is a conflict between the law and the landlord's religious beliefs.[297] He has also noted that the focus of the substantial burden inquiry is "the degree that the government's requirement will, directly or indirectly, make the believer's religious duties more difficult or more costly."[298] The Supreme Court similarly has focused on the burden the state places on the religious objector to either forego otherwise lawful behavior or violate his religious beliefs:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an

293. CATECHISM, *supra* note 288, para. 2353, at 565, para. 2390, at 575.

294. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *1 & nn.2 & 3 (9th Cir. Jan. 14, 1999)(quoting Scriptures and citing historic Christian commentaries to establish this point).

295. *See* Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972); Sherbert v. Verner, 374 U.S. 398, 403-04 (1963).

296. *See, e.g.*, Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 947 (Cal. 1996)(Kennard, J., concurring and dissenting)(noting that Smith was a widow who derived her income largely from her rental properties).

297. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 1242 (2d ed. 1988)("In order to gain the exemption, the claimant must show (1) a sincerely held religious belief, which (2) conflicts with, and thus is burdened by, the state requirement."); *see also* Attorney Gen. v. Desilets, 636 N.E.2d 233, 236-37 (Mass. 1994) (applying Professor's Tribe's standard for the substantial burden test).

298. TRIBE, *supra* note 297, § 14-12, at 1247.

> adherent to modify his behavior and to violate his beliefs, a burden on religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[299]

Indeed, "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [a citizen] for her [Sabbath] worship."[300]

For example, in a case involving the denial of unemployment benefits, the Court held that there was a substantial burden on the believer's free exercise rights even though his beliefs did not compel him to engage in the activity at issue. The Court found it determinative that "the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice."[301]

Likewise, when the government requires religious landlords to violate their faith by renting to unmarried cohabitants, it substantially burdens their free exercise rights because it "conditions receipt of an important benefit,"[302] or the right to engage in the rental housing business, "upon conduct proscribed by a religious faith."[303] The law therefore puts substantial pressure on these landlords to modify their beliefs. In fact, they arguably face substantially more government coercion than the employees seeking unemployment benefits in the *Sherbert* line of cases did. Those employees lost only the opportunity to receive a government payment. In cases involving alleged fair housing violations, landlords could face pressure to abandon their business and lose income, as well as legal action such as cease-and-desist orders, civil and criminal penalties, or even imprisonment.[304] The mere fact that a religious landlord would ignore such daunting disincentives and continue to defend his religious principles throughout the court system should alone attest to the substantial burden that has been placed on his free exercise rights.

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299. Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981); *see also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987) (employee's free exercise rights were substantially burdened where the employee was forced to choose between fidelity to religious belief and continued employment); Sherbert v. Verner, 374 U.S. 398, 405-06 (1963)(noting that infringement upon free exercise is substantial where a state conditions receipt of an important benefit upon conduct proscribed by a religious faith).

300. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

301. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987).

302. Thomas v. Review Bd., 450 U.S. 707, 717 (1981).

303. *Id.*

304. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 954 (Cal. 1996)(Kennard, J., concurring and dissenting); Attorney Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994).

The weight of authority in the landlord and tenant cases is consistent with the above analysis. In *Attorney General v. Desilets,* the Supreme Judicial Court of Massachusetts held that

> the government has placed a burden on the defendants that makes their exercise of religion more difficult . . . . The statute affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation. Moreover, both their nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many and thus burden the exercise of the defendants' religion.[305]

The Court of Appeals for the Ninth Circuit likewise recently held that Alaska state and local laws which required landlords to rent to unmarried couples substantially burdened the religious beliefs of two Christian landlords who objected to the laws.[306] Similarly, in *Jasniowski v. Rushing,* the Illinois Appellate Court emphasized that the "substantial burden is defined by [the landlord's] 'either-or' choice to comply with the ordinance or adhere to his religious convictions, not merely by its economic impact."[307]

The burden on the landlords' free exercise rights should be beyond dispute. Nonetheless, two recent opinions provide some support for the contrary view. In *Smith v. Fair Employment & Housing Commission,* a plurality of the California Supreme Court held that the state's marital status discrimination law did not substantially burden a landlord's free exercise rights.[308] The Supreme Court of Alaska reached a similar conclusion in *Swanner v. Anchorage Equal Rights Commission.*[309] Each decision has limited value as precedent for the substantial burden issue. In *Smith v. Fair Employment & Housing Commission,* only three justices joined in the plurality's substantial burden analysis.[310] Because this opinion was rendered by a mere plu-

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305. Attorney Gen. v. Desilets, 636 N.E.2d 233, 237-38 (Mass. 1994)(footnote omitted).

306. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *26 (9th Cir. Jan. 14, 1999).

307. Jasniowski v. Rushing, 678 N.E.2d 743, 749 (Ill. App. Ct. 1997), *vacated on other grounds,* 685 N.E.2d 622 (Ill. 1997); *see also* Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 42-44 (Ct. App. 1991), *review granted,* 825 P.2d 766 (Cal. 1992), *review dismissed,* 859 P.2d 671 (Cal. 1993)(not published in official reporter and cannot be cited in California); State v. French, 460 N.W.2d 2, 8 (Minn. 1990)("It is unreasonably cynical to say that [the landlord's] choice is simple: that he need not rent at all. Economic necessity may require him to seek rental income and this may be as critical to him as the need for wage income . . . .").

308. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996)(plurality opinion).

309. 874 P.2d 274, 283-84 (Alaska 1994).

310. While concurring in the plurality's refusal to exempt the landlord from the state fair housing law on religious grounds, Justice Mosk limited his opinion to the unconstitutionality of the federal Religious Freedom and Restoration Act. Justice Mosk specifically opined that it would be unconstitutional for the court to engage in a substantial burden analysis. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 937-39 (Cal. 1996) (Mosk, J., concurring). Justice Mosk

rality, it lacks authority as precedent in California.[311] As for *Swanner*, the Alaska Supreme Court did not directly apply a substantial burden test. Rather, the court addressed the landlord's burden within its discussion of the landlord's behavior as a threat to public safety in relation to the state's compelling interest in enforcement of the fair housing law.[312] The Alaska court did not grapple with well-established Supreme Court precedent regarding the substantial burden analysis.[313] Moreover, the Ninth Circuit, which encompasses both Alaska and California, recently reached the opposite conclusion on the substantial burden issue.[314] Although both *Smith v. Fair Employment & Housing Commission* and *Swanner* are of limited precedential value on the substantial burden issue, they likely will generate some attention in future cases. Upon close examination, the analysis in both opinions is muddled and patently inconsistent with Supreme Court precedent.

The California plurality held that the landlord's free exercise rights were not substantially burdened partially because the landlord had the option of getting out of the rental business and "redeploying the capital in other investments."[315] The plurality explained that the transaction costs of such reinvestment did not constitute a substantial burden but merely made the practice of the landlord's religion more expensive.[316] The plurality analogized the landlord's burden to that of the plaintiffs in *Jimmy Swaggart Ministries v. Board of Equalization,*[317] and *Braunfeld v. Brown.*[318] In *Swaggert*, the Court rejected the argument that a state sales tax on religious materials substantially burdened a religious group's free exercise rights because it reduced the amount of money available for religious activities.[319] In

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therefore did not indicate how he would have analyzed the substantial burden issue had he thought it appropriate to do so. Also, he limited his discussion entirely to federal free exercise law and thus did not address whether the California Constitution might require a strict scrutiny analysis. *See id.* at 931-39.

311. *See* Board of Supervisors v. Local Agency Formation Comm'n, 838 P.2d 1198, 1207 (Cal. 1992).

312. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281-84 (Alaska 1994).

313. *See id.* at 283 (briefly discussing United States v. Lee, 455 U.S. 252 (1982)). Although the "threat to public safety" standard is not directly applicable under *Sherbert* and its progeny, this standard concerns the nature of the state interest and thus should overlap substantially with the federal compelling interest standard.

314. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *19-21 (9th Cir. Jan. 14, 1999).

315. Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996)(plurality opinion).

316. *See id.* at 926-27.

317. 493 U.S. 378 (1990).

318. 366 U.S. 599 (1961).

319. *See* Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391 (1990).

Braunfeld, the Court ruled that applying Sunday closing laws to Jewish businessmen merely imposed an economic disadvantage that did not constitute a substantial burden on their religious beliefs.[320] In *Smith v. Fair Employment & Housing Commission*, the California plurality cited these two cases to support its conclusion that the economic burden on the landlord of abandoning the rental business was no more onerous than the burden on Swaggert or Braunfeld.[321]

The California plurality distinguished *Smith v. Fair Employment & Housing Commission* from *Sherbert* by noting that the degree of compulsion in unemployment-compensation cases was greater than in housing discrimination cases because the employees in unemployment cases had to choose between adherence to their religious beliefs and foregoing compensation altogether.[322] According to the plurality, the landlord's livelihood was not similarly threatened because she could simply sell her rental units and reinvest the money elsewhere.[323] The plurality further attempted to distinguish the United States Supreme Court unemployment cases by noting the absence of third party interests in those cases.[324]

Similarly, the Alaska Supreme Court determined in *Swanner* that the marital status discrimination provision in the state's fair housing law did not burden a religiously motivated landlord's free exercise rights.[325] The court reasoned that

> the economic burden, or "Hobson's choice," of which [the landlord] complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. . . . Voluntary commercial activity does not receive the same status accorded to directly religious activity . . . . Because [the landlord's] religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws.[326]

The substantial burden analysis in *Smith v. Fair Employment & Housing Commission* and in *Swanner* is misguided for several reasons. First, and most importantly, both courts muddle together the substantial burden and compelling state interest tests. The impact of the landlord's behavior on third parties is only relevant to determine whether the state has shown it has a compelling interest in enforcing the statute against the landlord. This impact is irrelevant to whether a statute substantially burdens a landlord's free exercise rights.[327] As

320. *See* Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961).
321. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 926-27 (Cal. 1996)(plurality opinion).
322. *See id.* at 925.
323. *See id.*
324. *See id.* at 925-29.
325. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).
326. *Id.* at 283-84 (citations omitted).
327. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 947-48 (Cal. 1996)(Kennard, J., concurring and dissenting).

the label for the test suggests, the substantial burden inquiry is limited simply to ascertaining whether the law substantially burdens the free exercise of the landlord's faith.[328] If so, then the burden shifts to the state to show a compelling interest and narrowly tailored means.[329] By mixing third party interests into the discussion of the burden on the landlord's free exercise rights, each court improperly shifted the burden of proof from the state to the landlord. Moreover, this misapplication of the law enabled the California plurality in *Smith v. Fair Employment & Housing Commission* to avoid an honest examination of whether the state could demonstrate a compelling interest in protecting unmarried cohabitants.[330]

The *Swanner* court similarly erred when it based its burden analysis on a false dichotomy between commercial and religious activity.[331] Quoting *Lee*, the court asserted that when religious people voluntarily enter into commercial activity, they may not exalt their own religious values above laws which regulate that commercial activity.[332] However, the *Lee* court was not engaging in a substantial burden analysis in the portion of the opinion quoted in *Swanner*.[333] In fact, the Supreme Court held that because the payment of social security taxes and receipt of social security benefits violated Lee's religious beliefs, compulsory participation in the social security system substantially burdened his free exercise rights.[334] After determining that the social security system furthered a compelling governmental interest, the Court decided that Lee's beliefs could not be accommodated without undermining that interest. The language the *Swanner* court quoted occurred at the end of *Lee* and had no bearing on the substantial burden issue.[335]

In *Bowen v. Roy*,[336] the Supreme Court held that a Native American's religious beliefs were burdened by the requirement of welfare applicants to supply social security numbers. No religious beliefs compelled participation in the activities that created conflicts in *Roy* or

328. *See supra* notes 295-307 and accompanying text (explaining how the substantial burden test focuses simply on whether the law burdens the objector's free exercise rights).

329. *See supra* note 273.

330. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 929 & n.21 (Cal. 1996)(plurality opinion).

331. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283-84 (Alaska 1994).

332. *See id.* at 283.

333. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *19 (9th Cir. Jan. 14, 1999).

334. *See* United States v. Lee, 455 U.S. 252, 257 (1982).

335. *See id.* at 261.

336. 476 U.S. 693 (1986).

Lee.[337] Both believers could have avoided the conflict by abandoning the activity. In both cases, the motivation for the activity was economic gain, not religious observance, yet the Supreme Court held that each of these conflicts resulted in a substantial burden on the believer's religion which the government had to justify under the compelling state interest test.[338] As the Ninth Circuit recently stated, "In none of [the Supreme Court's unemployment benefits] cases did the Court entertain—much less credit—the argument that the religious adherent could simply have left his job and have found an occupation that better suited his religious beliefs and principles."[339] Given that the landlord's religious objection to unmarried cohabitation is contrary to his pecuniary interests,[340] the conclusion that the state has substantially burdened a religious objector's religious beliefs is even more compelling in these landlord and tenant cases.

Second, the *Smith v. Fair Employment & Housing Commission* plurality's reliance on *Braunfeld* and *Swaggert* is misplaced. Neither of those cases involved a government rule that required an objector to violate his religious beliefs in order to engage in selected activity. In other words, neither case presented a conflict between religious belief and secular command that could only be resolved by abandoning the objector's desired activity. In *Braunfeld*, the Sunday closing law did not conflict with the Jewish shopkeepers' religious beliefs.[341] The shopkeepers could continue to observe the Sabbath on Saturday without violating the law or abandoning their businesses.[342] Likewise, the Court explained in *Swaggert* that the state sales tax simply increased the cost of the ministry's activities but did not require ministry members to violate their consciences in order to comply with the law:

> There is no evidence . . . that collection and payment of the tax violates appellant's sincere religious beliefs . . . . The only burden on appellant is the claimed reduction in income resulting from the presumably lower demand for

337. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 946 (Cal. 1996)(Kennard, J., concurring and dissenting).

338. *See id.* at 945.

339. Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *20 (9th Cir. Jan 14, 1999).

340. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 238 (Mass. 1994)("The fact that the [landlords'] free exercise of religion claim arises in a commercial context . . . does not mean that their constitutional rights are not substantially burdened. This is not a case in which a claimant is seeking a financial advantage by asserting religious beliefs."); *see also supra* notes 120-22 and accompanying text (explaining how landlords have no economic incentive to exclude unmarried cohabitants).

341. *See* Braunfeld v. Brown, 366 U.S. 599, 603-05 (1961).

342. *See id.* (explaining that a Sunday closing law does not infringe on a Sabbatarian's freedom of belief); *see also* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 948-49 (Cal. 1996)(Kennard, J., concurring and dissenting)(distinguishing *Braunfeld* on the grounds that nothing in the Jewish Orthodox religion compelled Jewish shopkeepers to do that which the government prohibited).

> appellant's wares (caused by the marginally higher price) and from the costs associated with administering the tax.[343]

By contrast, religious landlords who object to renting to unmarried couples are forced to choose between religious belief and secular command. They must choose between obeying the law or abandoning the rental market to avoid violating their religious convictions.[344] Forcing landlords to make this choice imposes a substantial burden on their free exercise rights.[345]

Third, the *Smith v. Fair Employment & Housing Commission* plurality artificially distinguished the Supreme Court unemployment cases and consequently trivialized the substantial coercion faced by religious landlords. As Justice Kennard succinctly explained in her separate opinion:

> Smith is subject to greater, not less, coercion than those who follow their religious beliefs rather than their employers' demands. If they are fired and denied unemployment benefits, they only lose a state subsidy of their transaction costs in finding new employment. For following her religious beliefs, . . . Smith is subject to civil penalties, a cease-and-desist order dictating her future conduct, and imprisonment.
>
> Nor is the compulsion any less because . . . Smith can sell her [properties and redeploy her capital]. The employees in the unemployment benefits cases . . . could have likewise sought other forms of employment that did not conflict with their religious beliefs, . . . but that fact did not justify the denial of benefits to them when they quit work for religious reasons.[346]

Indeed, the Supreme Court in *Sherbert* explicitly rejected the argument that the indirect economic pressure from the state's denial of unemployment benefits did not substantially burden the plaintiff's free exercise rights: "In a sense the consequences of [being denied unemployment benefits] may be only an indirect result of welfare legislation within the State's general competence to enact . . . but the

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343. Jimmy Swaggert Ministries v. Board of Equalization, 493 U.S. 378, 391 (1990).

344. *See* Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 42-44 (Ct. App. 1991), *review granted*, 825 P.2d 766 (Cal. 1992), *review dismissed*, 859 P.2d 671 (Cal. 1993)(not published in official reporter and cannot be cited in California); Jasniowski v. Rushing, 678 N.E.2d 743, 749 (Ill. App. Ct. 1997), *vacated on other grounds*, 685 N.E.2d 622 (Ill. 1997); Attorney Gen. v. Desilets, 636 N.E.2d 233, 237-38 (Mass. 1994); State v. French, 460 N.W.2d 2, 8 (Minn. 1990); *see also* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 949 (Cal. 1996)(Kennard, J., concurring and dissenting)(distinguishing *Swaggart*); *id.* at 966-67 (Baxter, J., dissenting)(distinguishing *Braunfeld*).

345. *See generally* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987); Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981); Sherbert v. Verner, 374 U.S. 398, 405-06 (1963). *Hobbie, Thomas,* and *Sherbert* all held that an employee's free exercise rights are substantially burdened where an employee is forced to choose between fidelity to religious belief and continued employment.

346. Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 946 (Cal. 1996)(Kennard, J., concurring and dissenting)(citation omitted); *see also* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *20-21 (9th Cir. Jan. 14, 1999)(quoted at *supra* note 339 and accompanying text).

pressure upon her to forego [the] practice [of her religion] is unmistakable."[347]

The substantial burden analyses in *Swanner* and in *Smith v. Fair Employment & Housing Commission* are result-oriented and poorly reasoned. The *Smith v. Fair Employment & Housing Commission* plurality goes to great, intellectually dishonest lengths to avoid requiring the state to show a compelling governmental interest in protecting unmarried couples from housing discrimination. Even though these opinions appear troubling for landlords, the legal analysis is so misguided that it is unlikely to persuade more astute, less politically motivated judges. A law that requires landlords to rent to unmarried couples undeniably imposes a substantial burden on the landlords' free exercise rights. Accordingly, such a law should be subjected to strict scrutiny review.[348]

V. STRICT SCRUTINY REVIEW

Regardless of how strict scrutiny review is triggered, whether through the Federal Free Exercise Clause,[349] the federal Establishment Clause,[350] or a state free exercise clause,[351] this standard requires the state to prove that the law in question furthers a *compelling governmental interest* and is the *least restrictive means* of furthering that interest.[352]

A. Compelling State Interest

The state must bear the traditionally heavy onus of proving a compelling state interest. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[353] The Supreme Court has shown that it means what it says when it requires the state to prove interests "of the highest order."[354] "Only the *gravest abuses, endangering paramount*

347. Sherbert v. Verner, 374 U.S. 398, 403-04 (1963)(footnote omitted)(citation omitted).

348. *See* Wisconsin v. Yoder, 406 U.S. 205, 214-25 (1972); Sherbert v. Verner, 374 U.S. 398, 403, 407-09 (1963).

349. *See supra* sections IV.A.2.a & IV.B.

350. *See supra* section IV.A.2.b.

351. *See supra* section IV.C.

352. *See* Larson v. Valente, 456 U.S. 228, 246-47 (1982); Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972); Sherbert v. Verner, 374 U.S. 398, 407-09 (1963). As explained in *supra* note 272, state courts have typically applied the *Sherbert/Yoder* strict scrutiny analysis, or some close variation of it, when analyzing unique state free exercise claims. The analysis in this section should be relevant under any state free exercise test that applies.

353. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

354. *Id.*

interest, give occasion for permissible limitation."[355] Even after *Employment Division v. Smith*, the Court has been clear that when strict scrutiny applies, the compelling interest standard "is not 'water[ed] . . . down' but 'really means what it says.'"[356] Thus, to meet this heavy burden, the state may not simply postulate some general policy to support the law. Rather, the state must prove that the law is necessary to meet an existing need of the highest order.[357]

The task before the state in this area of landlord and tenant law is clear. In *Attorney General v. Desilets*,[358] the Supreme Judicial Court of Massachusetts rejected the state's naked assertion that its interest in eliminating discrimination in housing justified forcing two devout Roman Catholic landlords to violate their faith by renting to an unmarried couple. As the court explained:

> The general objective of eliminating discrimination of all kinds . . . cannot alone provide a compelling State interest that justifies the application of [the fair housing law] in disregard of the defendants' right to free exercise of their religion. The analysis must be more focused. At the least, the Commonwealth must demonstrate that it has a compelling interest in the elimination of discrimination in housing against an unmarried man and an unmarried woman who have a sexual relationship and wish to rent accommodations to which [the fair housing law] applies.[359]

The court accordingly remanded the case for further proceedings to allow the state to meet this burden of proof.[360] Three justices dissented, arguing that the state could not possibly demonstrate such a compelling interest.[361] The view of these dissenting justices proved to be prescient. After the case was remanded, the state abandoned its campaign against the landlords.[362]

In all reported cases to date, no state actor has ever offered concrete proof to demonstrate a compelling state interest in providing unmarried couples with a right to live where they choose. In every case, the state, taking the same position the court explicitly rejected in *Desilets*, has simply asserted the need to eradicate discrimination

355. Sherbert v. Verner, 374 U.S. 398, 406 (1963)(quoting Thomas v. Collins, 323 U.S. 516, 530 (1945))(emphasis added).

356. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)(quoting Employment Div. v. Smith, 494 U.S. 872, 888 (1990)).

357. *See, e.g., id.* at 543-44 (rejecting the naked ipse dixits offered by the city to justify its animal sacrifice law); Thomas v. Review Bd., 450 U.S. 707, 719 (1981)(holding that, although the justifications offered by the state to justify its law were facially important, the state did not meet the compelling interest standard because there was no evidence in the record to support those justifications).

358. 636 N.E.2d 233 (Mass. 1994).

359. *Id.* at 238.

360. *See id.* at 241.

361. *See id.* at 246-47 (O'Connor, J., joined by Nolan and Lynch, JJ., dissenting).

362. Telephone interview with the office of Jay Alan Sekulow, Chief General Counsel, the American Center for Law and Justice, and counsel for Ronald and Paul Desilets (February 18, 1998).

against unmarried couples in housing.[363] The Supreme Courts of Alaska and Michigan stand alone in holding that the state meets its burden of demonstrating a compelling interest by merely asserting a need to eliminate such alleged discrimination.[364] As the Alaska court asserted, the state has a controlling "governmental interest in abolishing improper discrimination[,] . . . based on irrelevant characteristics[,] . . . that degrades individuals, affronts human dignity, and limits one's opportunities . . . ."[365]

There are numerous flaws in the Alaska and Michigan courts' analyses. The most fundamental flaw stems from the courts' failure to demand that the state meet its burden of producing evidence that shows an interest of the highest order that must be addressed by the state. Naked ipse dixits are not enough to meet this burden.[366] The Supreme Judicial Court of Massachusetts, a progressive bench which determined that landlords commit marital status discrimination by not renting to unmarried couples,[367] correctly understood and applied this principle:

> Without supporting facts in the record or in legislative findings, we are unwilling to conclude that simple enactment of the prohibition against discrimination based on marital status establishes that the State has such a substantial interest in eliminating that form of housing discrimination that . . .

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363. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282-83 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 929 & n.21 (Cal. 1996)(plurality opinion); McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998); State v. French, 460 N.W.2d 2, 9-11 (Minn. 1990).

364. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282-83 (Alaska 1994); McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich 1998).

365. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994); *see also* McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich 1998). The plurality in *Smith v. Fair Employment & Housing Commission* expressed a similar view by noting that the state must protect "the rights of [the] prospective tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics." Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996)(plurality opinion). However, the plurality referred to this alleged state interest while incorrectly analyzing the substantial burden issue. *See supra* notes 315-348 and accompanying text. In fact, because it held there was no substantial burden on the landlord's religious beliefs, the plurality found it unnecessary to engage in a compelling interest analysis. *See supra* note 330 and accompanying text. A lower Illinois court essentially agreed with *Swanner* but the Supreme Court of Illinois vacated that decision. *See* Jasniowski v. Rushing, 678 N.E.2d 743, 751 (Ill. App. Ct. 1997), *vacated*, 685 N.E.2d 622 (Ill. 1997).

366. *See supra* notes 352-57 and accompanying text; *see also* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 286 (Alaska 1994)(Moore, C.J., dissenting)(quoting Frank v. Alaska, 694 P.2d 1068, 1070 (Alaska 1979))(explaining that the state must show "that cohabiting couples have experienced hardship in finding available housing, i.e., that [the landlord's] conduct poses a 'substantial threat to public safety, peace or order.'").

367. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994).

> the substantial burden on the defendants' free exercise of religion must be disregarded.[368]

In their apparent zeal to rule for the unmarried couple, the Alaska and Michigan courts completely disregarded controlling principles of law. The state cannot establish a compelling state interest without offering any evidence to support it.

Second, the Alaska court[369] erroneously assumed that a landlord who refuses on religious grounds to rent to unmarried couples discriminates "based on irrelevant characteristics."[370] As explained earlier, a landlord like Swanner does not discriminate based on an irrelevant characteristic but simply objects to the prospective tenants' conduct.[371] Indeed, these landlords will not allow anyone, regardless of that person's marital status, to engage in sex with someone other than that person's spouse on the landlord's property.

Third, even if the landlord's behavior could be considered status-based discrimination, there is no evidence that such discrimination is so common it constitutes a significant state interest.[372] To the contrary, complaints against landlords for refusing to rent to unmarried couples are extremely rare.[373] This is not surprising given that landlords have no economic incentive to exclude such a large group of prospective tenants.[374] As Justice Kennard explained in her separate opinion in *Smith v. Fair Employment & Housing Commission,* unmarried cohabitants were relatively rare until the 1960s.[375] Once they appeared in significant numbers, they became socially accepted, and "whatever housing and employment barriers existed for them crumbled rapidly and almost completely."[376] Justice Kennard noted one commentator's argument that

> California authorities . . . [do not mention] any evidence that unmarried couples were actually having difficulty finding housing; without such evi-

368. *Id.* at 240.
369. The Michigan Supreme Court's analysis of the compelling state interest issue was cursory and shallow. *See* McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998). Thus, the remainder of the discussion of this issue in this section responds only to the Alaska court's more detailed analysis.
370. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282-83 (Alaska 1994).
371. *See supra* section II.B.1.
372. The discussion that follows overlaps in many respects with the analysis in Part III, *supra,* of whether the state may exercise its police power to favor unmarried couples in the rental market. However, it is important to remember that although the landlord bears the burden of prevailing on a police power challenge, *the state* must meet the heavy burden of establishing a compelling state interest. *See supra* notes 352-57 and accompanying text.
373. *See supra* notes 112-19 and accompanying text.
374. *See supra* notes 124-26 and accompanying text.
375. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 953 (Cal. 1996)(Kennard, J., concurring and dissenting).
376. *Id.*

> dence, this claim of compelling interest is utterly frivolous. The stakes are entirely symbolic: sex outside marriage has gone from misdemeanor to compelling interest in one generation, and religious believers who resist the change must be crushed.[377]

Fourth, even if the state could somehow show that unmarried couples have significant problems finding housing due to status-based discrimination, eradicating this type of discrimination is not a paramount interest of the highest order. Only in cases of racial, ethnic or gender discrimination has the Supreme Court recognized the prevention of discrimination as an interest compelling enough to justify restrictions on constitutional rights.[378] Discrimination against unmarried couples is completely unlike the racial, ethnic and gender discrimination that has plagued this country.[379] Justice Thomas explained this point well in his dissenting opinion to the Supreme Court's denial of a writ of certiorari in *Swanner*.[380] Discussing *Bob Jones University v. United States*,[381] Justice Thomas explained that the interest in eliminating racial discrimination in that case was compelling because "every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."[382] Justice Thomas noted that, by contrast, there has been no firm national policy against marital status discrimination. For this reason, the Supreme Court and the courts of appeals have never accorded marital status classifications any heightened scrutiny under Equal Protection Clause jurisprudence.[383] In fact, states routinely practice marital status discrimination in other areas of the law, such as laws governing intestate succession, insurance, worker's compensation,

377. *Id.* (quoting Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 223-24 (1994))(alteration in orginal).

378. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *21-22 (9th Cir. Jan. 14, 1999).

379. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 239 (Mass. 1994)(noting that marital status discrimination is not as intense a concern as discrimination based on other classifications but remanding for further factual findings regarding whether the state could show a compelling interest); State v. French, 460 N.W.2d 2, 10 (Minn. 1990)(holding that eradicating discrimination against unmarried couples is not a compelling state interest because such discrimination is neither invidious nor pervasive).

380. *See* Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979 (1994)(Thomas, J., dissenting).

381. 461 U.S. 574 (1983).

382. Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 981 (1994)(Thomas, J., dissenting)(quoting Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983)).

383. *See id.* (citing Smith v. Shalala, 5 F.3d 235, 239 (7th Cir. 1993)); Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *22 (9th Cir. Jan. 14, 1999).

and privileged communications.[384] Moreover, the Supreme Court has approved bestowing rights on married couples that are not given to unmarried couples by recognizing a substantive due process right to live with relatives but refusing to extend that right to unrelated individuals.[385] As Yale Law Professor Stephen L. Carter explained while criticizing the holding in *Swanner* and the plurality opinion in *Smith v. Fair Employment & Housing Commission*:

> Now, let us agree, for the sake of argument, that it generally is wrong to discriminate against couples on the basis of marital status. On the other hand, in a nation facing a moral crisis sufficiently acute that each politician falls over the next to insist on the value of the traditional family, it is far from ridiculous, and certainly it is not invidious, to offer some forms of preferential treatment for married couples. In fact, nearly every state, including every state that bans discrimination on the basis of marital status, has some policies that grant to married couples benefits that are denied to everybody else. Does this simply show a foolish inconsistency that need not long detain us? I think not: I think it shows that the states themselves do not believe that their interest in banning discrimination on the basis of marital status is compelling.
>
> . . . .
>
> More important, to conclude that discrimination on the basis of marital status is as compelling as discrimination on the basis of race is to trivialize our nation's . . . racial histor[y] . . . .[386]

In *Swanner*, the court attempted to distinguish the state's own acts of marital status discrimination in other areas of the law:

> The dissent attempts to prove that the state does not view marital status discrimination in housing as a pressing problem by pointing to other areas in which the state itself discriminates based on marital status. However, those areas are easily distinguished. The government's interest here is in specifically eliminating marital status discrimination in housing, rather than eliminating marital status discrimination in general. Therefore, other policies which allow marital status discrimination are irrelevant . . . .[387]

The inconsistency and circularity of the court's analysis is breathtaking. Earlier, the court had specifically classified the state's interest as "preventing individual acts of discrimination based on irrelevant characteristics."[388] There, the court essentially claimed that discrimination against unmarried couples is invidious in *any* context. If such discrimination is truly invidious, it is *always* wrong. The state cannot

384. *See* Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 982 (1994)(Thomas, J., dissenting); Attorney Gen. v. Desilets, 636 N.E.2d 233, 239-40 (Mass. 1994); State v. French, 460 N.W.2d 2, 10 (Minn. 1990); *see also* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 289 (Alaska 1994)(Moore, C.J., dissenting); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 952 (Cal. 1996) (Kennard, J., concurring and dissenting).

385. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *23 (9th Cir. Jan. 14, 1999)(citing Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977)).

386. Carter, *supra* note 6, at 1650-51.

387. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994).

388. *Id.* at 282.

claim that stamping out a form of private discrimination is an interest of the highest order when the state engages in the very same conduct. The Alaska court responded by suggesting that the state must treat married couples differently from unmarried couples to avoid fraudulent claims for benefits available only to spouses.[389] The court did not even pause to consider why such benefits should be available only to spouses if the eradication of discrimination against unmarried couples is a paramount state interest. If the eradication of marital status discrimination is truly a compelling governmental interest akin to the interest in eradicating racial or gender discrimination, then it must necessarily be eradicated from all areas of society and the law.

Trapped by its own logic, the best defense the *Swanner* court could muster was to repudiate its own earlier statement and to redefine the interest in the narrowest terms possible. In a clear sleight of hand, the court changed the interest from generally eliminating discrimination based on irrelevant characteristics, to eliminating only marital status discrimination in housing.[390] By so doing, the court contradicted itself and also employed circular reasoning. The issue is whether the state has a compelling interest in requiring religious landlords to rent to unmarried couples. The Alaska court held that the state has such an interest because elimination of marital status discrimination in housing is necessary. This is like saying that the state must criminalize lying because there is a compelling interest in the elimination of lying. The very interest scrutinized justifies itself. Needless to say, this is hardly the stuff of *strict* scrutiny.

Moreover, by narrowing the interest to housing, the Alaska court suggests that prospective tenants have a right to the rental housing of their choice.[391] However, the Supreme Court has explicitly rejected choice of housing as a fundamental right.[392] Moreover, neither the common law nor the Constitution provides such a right.[393] The right to housing of one's choice can only exist as a matter of legislative

389. *See id.* at 283.

390. *Compare* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282 (Alaska 1994)("The government possesses two interests here: a "derivative" interest in ensuring access to housing for everyone, and a "transactional" interest in *preventing individual acts of discrimination based on irrelevant characteristics.")* (emphasis added) *with id.* at 283 ("The government's interest here is in specifically eliminating marital status discrimination in housing, rather than eliminating marital status discrimination in general.").

391. *See id.* at 283; *see also* Smith v. Fair Employment and Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996)(plurality opinion) (referring to "the rights of . . . prospective tenants to have equal access to public accommodations"); Jasniowski v. Rushing, 678 N.E.2d 743, 751 (Ill. App. Ct. 1997)(referring to the "universal interest of Chicago residents in available housing"), *vacated*, 685 N.E.2d 622 (Ill. 1997).

392. *See* Lindsey v. Normet, 405 U.S. 56, 73-74 (1972); *see also supra* note 125 and accompanying text.

393. *See supra* notes 124-26 and accompanying text.

grace.[394] Once again, the *Swanner* court's logic is circular. The right that was first created in the statute cannot provide the compelling interest that justifies the state's enactment of the statute. Moreover, the court's suggestion that the right to rental housing is more important to the general public than employee benefits and inheritance laws is curious at best.

Justice Thomas offered a surgically precise summation of this issue in his dissenting opinion to the Court's denial of a writ of certiorari in *Swanner*:

> If, despite affirmative discrimination by Alaska on the basis of marital status and a complete absence of any national policy against such discrimination, the State's asserted interest in this case is allowed to qualify as a "compelling" interest—that is, a "paramount" interest, an interest "of the highest order"—then I am at a loss to know what asserted governmental interests are not compelling. The decision of the Alaska Supreme Court drains the word *compelling* of any meaning and seriously undermines . . . protection for exercise of religion . . . .[395]

Justice Thomas is absolutely correct. The mere assertion of a need to stamp out discrimination against unmarried couples in housing cannot alone satisfy the state's burden of proving a compelling interest. Rather, the state must, at a minimum, produce evidence showing: 1) historical and pervasive discrimination against unmarried couples; 2) the number of cohabiting couples and religiously motivated landlords; 3) the number of rental units not available because of the religious convictions of these landlords; 4) the length of time it takes to find appropriate housing; and 5) the types of housing available to unmarried cohabitants as an alternative.[396] Only then can the state meet its burden of showing a paramount interest in protecting unmarried cohabitants. If the state does not meet this heavy burden, it cannot justify forcing religious landlords to rent to unmarried couples.

B. Least Restrictive Means

Even if the state demonstrates a compelling interest, it must also show that it could not advance this interest if religiously objecting landlords were exempted from the law.[397] The issue here is "whether the rental housing policies of [religious objectors] can be accommo-

394. *See* Lindsey v. Normet 405 U.S. 56, 74 (1972)("Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.").

395. Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 982 (1994)(Thomas, J., dissenting).

396. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 238-41 (Mass. 1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 952-53 (Cal. 1996)(Kennard, J., concurring and dissenting). The court in *Desilets* explained that the state must analyze these variables in the locality of the alleged discrimination and not just state-wide. *See Desilets*, 636 N.E.2d at 241.

397. *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

dated . . . without significantly impeding the availability of rental housing for people who are cohabiting or wish to cohabit."[398] The state must proffer evidence that exempting religious landlords would lead to a shortage of housing for cohabiting unmarried couples. Mere speculation that such a shortage might occur is not sufficient to meet this burden of proof.[399]

No state has offered credible evidence to meet this burden, and it is very unlikely that a state could ever do so. The current data shows that religious landlords pose no tangible threat to the ability of unmarried couples to obtain housing.[400] Nationwide, there are only eight reported cases involving landlords who have decided for religious reasons not to rent to unmarried couples.[401] Thus, the state has no legitimate justification for refusing to exempt sincerely objecting religious landlords from a law requiring those landlords to rent to unmarried couples.

Moreover, exempting religious landlords will provide no real incentive for other landlords to register the same objection. These religious beliefs are at odds with the landlords' economic interests. Market forces discourage landlords from restricting the class of people to whom they will rent. By excluding unmarried couples, religious landlords artificially reduce demand for their apartments and the rent they can command.[402] Landlords who are willing to restrict their market unilaterally will then confront the risk of incurring potential fines and penalties for violating the state's fair housing law.[403] The tension between the objecting landlords' religious beliefs and their economic interests further reduces the possibility that exempting them would seriously, or even appreciably, affect the housing market for cohabiting couples.

This disincentive for landlords to exclude unmarried couples contrasts sharply with the incentive religious objectors have to claim

398. Attorney Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994); *see also* Smith v. Fair Employment Hous. Comm'n, 913 P.2d 909, 975 (Cal. 1996)(Baxter, J., dissenting)("There is nothing in the record to indicate the number of landlords [who object on religious grounds to renting to unmarried cohabitants] is so great as to cause a serious shortage of housing for unmarried couples.").

399. *See, e.g.,* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 835 (1989)(summarily rejecting the prophecy that "chaos would result" or that Sunday activities "will grind to a halt" if the religious objector's claim for benefits were granted); *see also* Thomas v. Review Bd., 450 U.S. 707, 719 (1981)(noting the absence of any evidence in the record to "indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create widespread unemployment, or even to seriously affect unemployment").

400. *See supra* notes 111-19 and accompanying text.

401. *See supra* notes 116-17 and accompanying text.

402. *See supra* notes 120-22 and accompanying text.

403. *See supra* notes 302-07 & 344-47 and accompanying text.

some governmental entitlements, such as unemployment benefits. Claimants for unemployment benefits have an obvious motivation to lie about whether religious beliefs impair their ability to work. Yet, the Supreme Court has consistently granted Sabbatarians exemptions from complying with state unemployment benefit laws requiring work on their Sabbath day.[404]

The state's burden of proving that a statute does not unnecessarily infringe upon the rights of landlords will be even more difficult if, as in several states, the fair housing law already provides some exemptions, including those for religious organizations and landlords who live on the premises or rent a limited number of units.[405] Having explicitly granted some exemptions, the state can hardly argue that exemptions threaten the interest behind the law. Exemptions for religious organizations and for landlords who live on the premises or who rent a limited number of units will protect a potentially large number of citizens. Because the state has determined that granting these exemptions would not impair any compelling interest, it can hardly argue that the same interest will be jeopardized if a relatively small number of market-defying, religious landlords are exempted as well.[406] The evidence strongly suggests that religious landlords who object to renting to unmarried cohabitants do not pose any threat to state fair housing laws.[407]

Not surprisingly, the Supreme Court of Alaska nevertheless held in *Swanner* that it could not grant a religious landlord an exemption from the state fair housing law. As the court put it, the state had an interest "in preventing acts of discrimination based on irrelevant characteristics regardless of whether the prospective tenants ultimately find alternative housing."[408] Thus, the court concluded, Swanner could not be granted an exemption because his "religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing."[409]

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404. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 832-35 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139-46 (1987); Thomas v. Review Bd., 450 U.S. 707, 716-20 (1981); Sherbert v. Verner, 374 U.S. 398, 410 (1963).

405. *See supra* notes 185-86 and accompanying text.

406. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994)(any asserted state interest is weakened by the fact that the state housing statute exempts religious organizations).

407. *See supra* notes 111-19 and accompanying text.

408. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282 (Alaska 1994).

409. *Id.* at 284; *see also* McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998)(reaching the same conclusion). Although this approach to narrow tailoring does not prevail in any other jurisdiction, in *Smith v. Fair Employment & Housing Commission*, a plurality of the California Supreme Court refused to grant the landlord an exemption in part because it would "completely sacrific[e] the rights of the prospective tenants not to be discriminated against by [the landlord] in housing

No state has ever substantiated the premise that it has a compelling interest in eliminating this alleged form of discrimination.[410] Nevertheless, even if the premise were sound, the opinion in *Swanner* completely eviscerates the narrow tailoring test. *Swanner* essentially held that the state prevails by merely asserting that its law protects a public interest of the highest order.[411] The narrow tailoring test requires the state to prove additionally that the alleged interest, here eliminating alleged discrimination against unmarried couples in rental housing, could not be achieved without infringing on the free exercise rights of landlords. It is certainly true that discrimination cannot be *completely* eradicated unless no exemptions are allowed, but if that were the test no exemptions would ever be allowed in any case. The Alaska court improperly employed a "most effective means" test rather than the "least restrictive means" test that actually applies.[412]

If the Supreme Court had applied this logic in its four unemployment benefits cases, it would have held that no exemptions could be granted because the most effective way to assure that only legitimately unemployed people receive benefits is to strictly enforce the weekend work requirements. Rather than misapplying the narrow tailoring standard in that way, the Court's decisions focused solely on whether granting exemptions would substantially threaten the state's goal of preventing unemployment.[413] By definition, if an exemption can be granted only if it will have *no* impact on the state's proffered

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accommodations on account of marital status." Smith v. Fair Employment and Hous. Comm'n, 913 P.2d 909, 928 (Cal. 1996)(plurality opinion). As explained earlier, the plurality incorrectly considered this argument as part of the substantial burden inquiry. To the extent this point is relevant at all, it should be addressed as part of the narrow tailoring analysis. *See supra* notes 324-27 and accompanying text.

410. *See supra* notes 327-30 and accompanying text.

411. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282-84 (Alaska 1994).

412. *See id.* at 280 n.9 ("[W]e hold . . . that compelling state interests support the prohibitions on marital status discrimination. The most effective tool the state has for combating discrimination is to prohibit discrimination. . . . Consequently, the means are narrowly tailored and there is no less restrictive alternative."). The Supreme Court of Michigan made a similar error of law when it held that objecting religious landlords were not entitled to an exemption from the state fair housing law because they could not "superimpose" their own beliefs on generally applicable statutory schemes. *See* McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998)(quoting United States v. Lee, 455 U.S. 252, 261 (1982)). If that proposition is literally true, then the state will always prevail when it acts to protect a compelling state interest and the least restrictive means test will be irrelevant.

413. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 832-35 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139-46 (1987); Thomas v. Review Bd., 450 U.S. 707, 713-20 (1981); Sherbert v. Verner, 374 U.S. 398, 410 (1963).

interest, then an exemption will never be granted and the narrow tailoring test will be pointless.

Given the Alaska court's propensity toward result-oriented reasoning, it is not surprising that it reached such a dubious conclusion on narrow tailoring. When a court correctly applies this test, the state will have a difficult burden to meet.[414] Unless the state can show that granting religious exemptions will undermine the purpose of the statute, the state must grant religious landlords an exemption.[415]

VI. CONCLUSION

It should now be clear why this Article began by comparing the "right" of unmarried cohabitants to the housing of their choice, notwithstanding the sincere religious objections of their prospective landlord, to the emperor's new clothes. The few courts that have taken it upon themselves to create this right have done so only by indulging vacuous assumptions at every turn. These courts have first assumed that the legislature intended to protect unmarried couples in housing transactions even though no statute explicitly does so. They

414. In a cursory opinion, the Supreme Court of Michigan mistakenly held that it could not grant an exemption to two religious landlords because they "have provided no argument to convince us that the state could have accomplished its goal of equal access to housing by less obtrusive means." McCready v. Hoffius, 586 N.W.2d 723, 729 (Mich. 1998). In addition to misunderstanding how the lest restrictive means test applies (see *supra* note 412), the court failed to appreciate that the state, not the landlord, must bear the burden of proof on this issue. *See supra* notes 352-62, 397-99 and accompanying text.

415. Some parties and commentators have argued that providing such an exemption would violate the Establishment Clause. *See* Thomas v. Anchorage Equal Rights Comm'n, Nos. 97-35220 & 97-35221, 1999 WL 11337, at *25-26 (9th Cir. Jan. 14, 1999); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 929 n.21 (Cal. 1996) (plurality opinion) (noting but not addressing this contention); Markey, *The Price, supra* note 6, at 815-17. This argument is mistaken. Since 1963, the Supreme Court has held in several cases that religious objectors were entitled to exemptions. *See supra* notes 154-68 and accompanying text. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court retreated from its prior approach to constitutionally mandated, generally available religious exemptions. *See supra* notes 169-77 and accompanying text. However, the Court expressly supported the concept of the legislature providing such exemptions. *See* Smith, 494 U.S. at 890. As explained earlier, per se exemptions do not violate the Establishment Clause, but only those that discriminate against particular religious beliefs. *See supra* notes 192-224 and accompanying text; *see also* Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953)(holding that it was unconstitutional for a municipality to prohibit Jehovah's Witnesses from preaching in a public park while allowing preaching by Catholics and Protestants); *Thomas*, 1999 WL 11337, at *25-26 ("Obviously, Free Exercise Clause exemptions do not as a general matter violate the Establishment Clause. . . . The Establishment Clause does not forbid what the Free Exercise Clause requires."). For the reasons explained in this Article, the state should exempt all sincere religious objectors, regardless of their faith, from having to violate their beliefs by renting to unmarried cohabitants.

have assumed that a prohibition against "marital status discrimination" protects unmarried couples even though cohabitants do not comprise a unique marital status. They have further assumed that these landlords discriminate against single people based on their status and not their sexual conduct, even though the opposite is true. They have further assumed the state is authorized to protect citizens who currently face no problems obtaining housing in the marketplace. By assuming that requiring landlords to violate their consciences is irrelevant, they have trivialized the landlords' religious beliefs even though those beliefs are firmly rooted in historic Judeo-Christian principles. They have trivialized the importance of racial equality and religious liberty with the facile assumption that protecting unmarried cohabitation is an interest of the highest order, rivaling the need to eradicate racial and ethnic discrimination and exceeding the need to protect religious liberty. They have rationalized away the states' histories of uniformly refusing to extend to unmarried cohabitants benefits that married couples enjoy. Finally, they have assumed that, even though few religious landlords have been willing to incur the state's wrath by not renting to unmarried couples, scores of unmarried cohabitants will be left homeless if the state grants religious landlords exemptions from this new, judicially-created right. They have made all of these assumptions without one shred of evidence to support them.

There can be little doubt about the true agenda here, although only one judge has clearly admitted it. Chief Justice Popovich of the Minnesota Supreme Court issued a strongly-worded dissent in *State v. French*.[416] In defending his belief that the landlord had committed marital status discrimination by excluding a "supposedly immoral couple,"[417] Chief Justice Popovich stated that "[r]eligious and moral values include not discriminating against others solely because of their color, sex, or whom they live with, avoiding unnecessary emotional suffering, showing tolerance for nontraditional lifestyles, and treating others as one would wish to be treated."[418] Justice Popovich went on to conclude that "[t]here is nothing inherently suspect about two unmarried people of the opposite . . . sex living together."[419]

Although this type of judicial activism, particularly in the realm of religious beliefs, is alarming,[420] at least Chief Justice Popovich admitted what is obviously behind this movement to favor unmarried couples in rental disputes. The jurists and commentators who support

416. 460 N.W.2d 2, 11-21 (1990)(Popovich, C.J., dissenting).
417. *Id* at 17.
418. *Id.*
419. *Id* at 18.
420. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . or force citizens to confess by word or act their faith therein." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

this minority trend in the law clearly believe there is nothing wrong with fornication and unmarried cohabitation,[421] and they want the state to punish those who sincerely disagree with them.

Few would argue with Justice Popovich's suggestion that it is wrong to discriminate based on immutable characteristics[422] and that it is desirable to live by the "golden rule."[423] People can, however, legitimately disagree about standards of sexual morality. These landlords simply want to rent their property without violating their conscience. They do not ask these unmarried couples to stop living together. They simply wish not to become morally implicated in what they sincerely consider sinful behavior. The issue for the courts is not whether the landlords' beliefs are correct. The issue is whether the state should respect the right of the landlords to act on these beliefs rather than effectively force the landlords to violate them.

Instead of allowing both sides to exercise their beliefs freely, the proponents of unmarried cohabitation insist on using the power of the state to force religious landlords to tacitly condone their sexual ethics. These proponents likely would applaud the state's decision to decriminalize fornication and unmarried cohabitation because it is wrong for the state to impose one set of moral standards. As the saying goes, sauce for the goose is sauce for the gander. If the state should not enact laws that impose one set of moral standards regarding the propriety of private, consensual sexual conduct, then it likewise should not enact laws that impose the countervailing set of moral standards. Ironically, these proponents often claim to esteem "tolerance" for others.[424] Apparently, their tolerance does not extend to the beliefs of people who sincerely disagree with them regarding the morality of fornication and unmarried cohabitation.

The master weavers have deceived us! The emperor is naked! Indeed, they have to some degree, and he certainly is.

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421. *See, e.g.*, Markey, *The Price*, *supra* note 6, at 702, 752, 822 (referring to the belief that fornication is immoral as "religious zealotry," "atavistic" and "arbitrary").

422. *See, e.g.*, *Leviticus* 19:15 (New International Version)("Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly."); *Galatians* 3:28 (New International Version)("There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus."): *James* 2:1-13 (instructing Christians not to show favoritism based on wealth or social status).

423. *See, e.g.*, *Leviticus* 19:18 (New International Version)("love your neighbor as yourself"); *Matthew* 7:12 (New International Version)("In everything do to others what you would have them do to you, for this sums up the Law and the Prophets.").

424. *See, e.g.*, State v. French, 460 N.W.2d 2, 15 (Minn. 1990)(Popovich, C.J., dissenting).